REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

H. C. W. WETHEY,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. XXXVIII.

CONTAINING THE CASES DETERMINED
FROM HILARY TERM, 39 VICTORIA, TO EASTER TERM, 39 VICTORIA
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:
ROWSELL & HUTCHISON.
1877.

PRINTED BY ROWSELL AND HUTCHISON, KING STREET EAST, TORONTO.

JUDGES

OF THE

COURT OF QUEEN'S BENCH

DURING THE PERIOD OF THESE REPORTS.

THE HON. ROBERT ALEXANDER HARRISON, C. J.
" " JOSEPH CURRAN MORRISON, J.
" " ADAM WILSON, J.

Attorney-General:
THE HONOURABLE OLIVER MOWAT.

A TABLE

OF

CASES REPORTED IN THIS VOLUNE.

A TABLE

OF THE

NAMES OF CASES CITED IN THIS VOLUME.

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REPORT OF CASES

IN THE

COURT OF QUEEN'S BENCH.

HILARY TERM, 39 VICTORIA, 1876.

From February 7th to February 26th.

Present:

THE HON. ROBERT ALEXANDER HARRISON, C. J.
" " JOSEPH CURRAN MORRISON, J.
" " ADAM WILSON, J.

MCDERMOTT ET AL. V. IRESON.

Rule nisi for new trial—Statement of grounds—Discovery of new evidence.

It is insufficient, in a rule *nisi*, to ask for a new trial for misdirection and non-direction, and on the ground of improper rejection of evidence and improper admission of evidence." The objections must be more specifically stated.

The discovery of new corroborative testimony is no ground for a new trial, nor is the intention to produce a witness in person whose evidence was taken under a commission and read to the jury.

Questions were raised as to the power of one I. to sell the goods in question, whether he was an agent within the Factors' Act, &c.; but the finding of the jury, which the Court refused to disturb, made it unnecessary to decide them.

REPLEVIN.

The first count of the declaration was for taking 996 feet of number one Berea Split Rock block stone lying on Front street in the city of Toronto, alleged to be the property of the plaintiffs.

The second count was for detaining the same stone.

The pleas were, to the first count, *non cepit;* to the whole declaration, that the goods were the property of the defendant; to the second count, *non detinet*, and to the whole declaration denial of the plaintiffs' property.

Issue.

The issues were tried at the last winter Assizes at Toronto, before Patterson, J., with a jury.

It appeared that the plaintiffs, who are a trading corporation, are dealers in stone, living in Cleveland, Ohio, and that on the 4th of July, 1874, one Ingham, then doing business in Toronto, by writing ordered stone of the plaintiffs.

The written order was as follows:

Toronto, July 4, 1874.

MESSRS. J. MCDERMOTT & CO.,
Cleveland, Ohio.

GENTLEMEN,

Please deliver on vessel at Cleveland and consign to my address the following bill: Best No. 1 Berea Split Rock at 64 cents per cubic foot, afloat at Toronto, gold payable in 60 and 90 days. Ship at once to Church Street wharf, Toronto, about 200 tons or 2800 cubic feet Berea Stone.

(Signed) RALPH INGHAM.

Plaintiffs' counsel then tendered in evidence the testimony of one *McDermott*, examined under a commission directed to a commissioner residing in Cleveland. The only objection taken to the commission was, that the commissioner's affidavit was not shewn to be in writing. It was in writing annexed to the commission, and so the objection was overruled.

McDermott, in answer to the first five interrogatories, swore that he was a general travelling agent in the employ of the plaintiffs: that he knew both the plaintiffs and the defendant: that he knew Ralph Ingham: that he knew the stone in question, and that he, deponent, was in Toronto about 12th July, 1874, and saw Ingham there at that time.

The sixth interrogatory was as follows: "What was the nature of your business with the said Ingham, and if you

had any dealings with him in respect to the stone in question, state what they were."

Objection was made to this interrogatory, but was overruled. The learned Judge, however, apparently without objection, rejected a portion of the answer to the interrogatory. The portion of the answer received shewed a dealing with Ingham respecting the stone which had then arrived, of which the quantity was 2996 feet, to the effect that 2000 feet should be the amount he was to receive as his stone; that Ingham was to pay freight on the whole 2996 feet; that plaintiffs would give him credit on account of his bill for freight, and that he was to take all the stone and remove it from the wharf; that he at first objected to remove more than 2000 feet; that Ingham wished deponent to remain and take care of the 996 feet, but deponent was unable to do so, and requested Ingham to take care of the whole vessel load as before stated, until his return to Toronto, when he would resell the 996 feet or take care of it, to all of which Ingham ultimately agreed; and it was then arranged that Ingham was to remove the 996 feet from the wharf solely for and on account of the plaintiffs, and for their accommodation.

In answer to the seventh, eighth, ninth, tenth, eleventh, and twelfth interrogatories, he swore that in what he did he acted on behalf of plaintiffs and with their authority: that when he saw Ingham the stone was in a vessel in the canal on the way to Toronto: that although the original order reads 200 tons, the amount finally sold and delivered to Ingham was 2000 feet and no more: that the whole of the stone in the vessel belonged to the plaintiffs until after it was unloaded at the wharf: that they sold this stone in Toronto delivered afloat at the wharf, and that he was specially ordered by the plaintiffs to look after this cargo when it arrived in Toronto, and made arrangements, as before stated with Ingham to take 2000 feet, plaintiffs keeping the balance 996 feet seven inches of stone.

His answer to the thirteenth interrogatory was objected to by the defendant. It was to the effect that besides the

conversation with Ingham already stated, he had a further conversation about two or three weeks afterwards with him, when it was agreed to let the 996 feet remain for the present on Front Street where it then was, and that he would write him from Cleveland or again visit Toronto and dispose of it; that Ingham agreed to give his notes for the 2000 feet if required, but said he would not receive or pay for the 996 feet, as he did not need it to complete his contracts, and said also that as he was just starting in business he would not be able to pay for it and wished to keep his credit good. He also proved a demand on and refusal by defendant to give the stone to the plaintiffs.

The sheriff's officer who replevied the stone was then called. He swore that he measured the quantity, 995 feet 10 inches: that it was on Front street when he replevied it: that it was pointed out to him: that a good deal was in the original blocks and some had been cut: that it was opposite to Dickey & Ginty's building: that there was more stone there than the quantity he replevied: that it was scattered along from near the Queen's Hotel to York street: that there were there at least 2000 feet, and that they were piled as close as they could unload such heavy stone.

This closed the case for the plaintiffs.

A nonsuit was moved on the following grounds:

1. The stone belongs to a corporation, and upon the last plea defendant should succeed as the action is brought by a private person.

2. It was not shewn that the stone replevied was the same that came by the schooner for the plaintiffs.

Leave was reserved to defendant to move to enter a nonsuit if necessary on these objections.

On the part of the defence the customs invoice on which the entry of the stone was made was produced and proved. It was dated Cleveland, Ohio, July 9, 1874. It was headed Mr. R. Ingham bought of J. McDermott & Co., and was for 72 pieces block stone, 2996 feet 7 inches, at 40 cents, $1198.63. The entry was made on 20th July, 1874, by a customs broker.

The defendant was then called as a witness on his own behalf. He swore he knew of the cargo of stone brought by the Pelton; that Ingham told him it was coming and produced to him on two separate occasions the invoice now produced: that Ingham was in his debt, and he, defendant, was pressing him, and that the cargo arrived about the 15th, 16th, or 17th of July, 1874.

Thereupon defendant was asked what took place between him and Ingham respecting the stone, and counsel for the plaintiff objected to the question, but the learned Judge overruled the objection and received the evidence.

Defendant swore that he got some of the stone brought by the Pelton: that he got the greater part of the cargo: that he received all except about 500 or 600 feet: that he purchased it from Ingham: that he had endorsed Ingham's notes for stone which he was to have used in works for defendant, who was a builder, under contracts which Ingham had with him: that he took away that stone and promised to replace it with other stone, and pledged himself that he had bought a load of stone in Ohio, and that as soon as it came it would be delivered to defendant: that he shewed defendant the invoice to assure him it was coming; that when it came he placed part on Front street opposite Ginty & Dickey's buildings and part on Front street opposite F. & G. Perkins' place, which is between Yonge and Church streets: that the stone placed opposite Ginty & Dickey's was put among the remnants of other stone which defendant had there: that when the stone was brought Ingham came to defendant for money and said he must have $600 on account of the stone: that defendant reminded him he had taken the other stone and this was to replace it: that he said he could not do with less than $600: that defendant refused to give him any more money till the stone was placed in his possession: that a written receipt was drawn up, dated 8th August, 1864: that after the receipt was given Ingham formally delivered the stone at both the places on Front street to defendant: that Ingham afterwards left and no one knows where he

has gone: that he owed defendant, everything considered, from $1,600 to $2,000, giving him credit for the stone and counting the cost of finishing the contracts.

The receipt was as follows:—

Toronto, August 8, 1874.

Received from Mr. W. Ireson the following sums on account of work done at Perkins's store, Front street, and at Messrs. Ginty & Dickey's stores, Front street; and also on account of the purchase money of the free stone now lying on Front street near Messrs. Ginty & Dickey's building, and on Front street by Mr. Perkins's building, and to be cut by me for work at stores on Front street as aforesaid, and also for store of Mr. Riddel on Melinda street as per contract with him, such stone to be delivered to said Ireson at said stores at such times and in such quantities as may be required for the due performance of the cut stone work at said stores on said street.

June	11, by note at two months.....	$500
"	20, by cash.....	10
"	28, by check Perkins.....	90
July	11, by check Perkins.....	100
"	14, by cash.....	4
"	18, by check Perkins.....	600
	By interest on endorsed note.....	9
Aug.	8, by check Perkins..	400

(Signed), RALPH INGHAM.

Defendant stated that the 500 or 600 feet of the cargo which he did not get was delivered to George Farquhar; and that some of the stone replevied never came in the Pelton.

On cross-examination, he swore that besides the $400 paid to Ingham on 8th of August, he paid a further sum of $600 at the time the stone was delivered to him.

Another witness was called for the defence, who corroborated the testimony of the defendant as to the fact that when the stone from the Pelton arrived there was some old stone. He mentioned that the quantity of old stone was about 300 feet. He also stated that the sheriff seized some of it under the writ of replevin.

The learned Judge charged the jury that if the stone in question was sent from Cleveland and delivered to Ingham

on the order of 4th July, 1874, then the property passed from plaintiffs and they could not recover in this suit, and that defendant would be entitled to a verdict on both the second and fourth pleas. But if, after the stone was shipped and before it arrived at Toronto, there was an agreement made as stated by McDermott in his evidence under the commission, that Ingham should only receive as his purchase 2,000 feet of the cargo, and that he should receive and hold the balance of 996 feet as agent for plaintiffs, then the property in 996 feet of the cargo remained in the plaintiffs. He stated there were grounds in the evidence of McDermott and other circumstances for not receiving without examination the evidence given by McDermott. He directed the jury that if the plaintiffs suffered Ingham to have possession of the stone apparently as owner, then as Ingham clearly was a person who from the nature of his calling might be taken *prima facie* to have a right to sell, the defendant would be entitled to a verdict if he bought the stone from Ingham without notice that he had not the right to sell, and that the transaction as stated by defendant would be a sale. He remarked that the evidence was that out of a cargo of 2,996 feet defendant received all but 500 or 600 feet, and that there was no evidence that the 996 feet was ever set apart from the bulk, and upon this state of facts the learned Judge expressed the opinion that the plaintiffs did not shew title to the stone they replevied.

He, however, asked the jury to find, first, was the new bargain made with McDermott, and if they found it was, he asked them to say if Ingham was left by plaintiffs in possession of the property as apparent owner, and if defendant bought from him without notice of his want of authority.

Counsel for the plaintiffs objected that unless Ingham was shewn to be an agent within the Factors' Act, he could not convey title, and that the learned Judge should have told the jury that the price paid must be a fair price and defendant must shew that, and that an overdue debt

cannot be taken as part of the price, and that the balance of that part of the stone found on Front street, west of the Queen's hotel, was to be presumed to belong to plaintiffs.

The jury found that the new bargain was not made, and that the stone was delivered on the original order.

The learned Judge on this finding entered the verdict for defendant.

In Easter term, May 19, 1875, *N. F. Hagel* obtained a rule calling on the defendant to shew cause why the verdict should not be set aside and a new trial had between the parties on the ground that the verdict was contrary to law and evidence and the weight of evidence, and for mis-direction and non-direction, and on the ground of improper rejection of evidence and improper admission of evidence, and on the ground of the discovery of new evidence, and on reading the affidavits filed.

In Michaelmas term, November 30th, 1875, *Delamere* shewed cause. The order of the 4th July, 1874, was accepted by plaintiffs. It was for the delivery of the stone afloat at Cleveland. The stone was so delivered, and from the moment it was so delivered it became and was the property of Ingham. Ingham had under any circumstances a right to dispose of the stone as his own. He received the invoice of it from plaintiffs and shewed it to defendant, who bought it on the strength of it, so that the plaintiffs are estopped from claiming the property as against defendant. Besides, of the 996 feet seized by plaintiffs as the surplus, it is clear that part of what was seized never was part of the 2,996 feet. The finding of the jury was in accordance with not against evidence or the weight of evidence. The affidavits disclose no grounds of relief, and are met by the affidavits in answer. No ground of mis-direction or non-direction is stated in the rule, and there was no misdirection or non-direction in fact. He referred to *Pickering* v. *Busk*, 15 East 38; *Manton* v. *Moore*, 7 T. R. 67; *Gunn* v. *Gillespie*, 2 U. C. R. 151; *Dyer* v. *Pearson*, 3 B. & C. 38; *Brady* v. *Todd*, 7 Jur. N. S.

827; *Chitty* on Contracts, 8th ed., 359. As to admixture, he cited *Story* on Bailments, 8th ed. sec. 40; *Lupton* v. *White*, 15 Ves. 432; *Panton* v. *Panton*, cited *Ib.* 440.

Hagel, contra. The order of the 4th July, 1874, was for delivery afloat at Toronto, and not at Cleveland, and long before the arrival in Toronto the new arrangement was made. There was no evidence to shew that Ingham was a person whose business it was to sell stone. The sale to Farquhar was out of the 996 feet which Ingham was authorized to sell for the plaintiffs. Under the circumstances there was nothing wrong in sending the invoice as the same was sent. The issue in replevin is divisible, and as to part of the stone the plaintiffs were clearly entitled to recover, and so the verdict was against evidence and the weight of evidence. Under any circumstances there should be a new trial, on the grounds disclosed in the affidavits.

February 4, 1876, HARRISON C. J.—It is provided by sec. 231 of the C. L. P. Act that "In every rule *nisi* for a new trial or to enter a verdict or nonsuit, the grounds upon which such rule has been granted shall be shortly stated therein; but in case of any omission, the Court may permit the rule to be amended and served again on such terms as are deemed reasonable."

No amendment of the rule *nisi* was asked for at the argument.

The grounds, according to the practice must be *specifically* stated in the rule.

It is not sufficient to state "on the ground of misdirection": *Montgomery* v. *Dean*, 7 C. P. 513; or mis-direction "on the subject of negligence": *Tuff* v. *Warman*, 2 C. B. N. S. 740, 743; or "on the grounds of objections taken at the trial, for the misdirection of the learned Judge at the trial, for the rejection of material evidence": *Strange* v. *Dillon*, 22 U. C. R. 223.

It is sufficient to state "that the verdict is against law and evidence," without stating in what manner the verdict is against evidence: *Cameron* v. *Milloy*, 14 C. P. 340.

There is no specific statement of misdirection or non-direction set forth in the rule. The Courts have not the time even if they had the inclination to search through the notes of the learned Judge to discover if there was any particular misdirection or non-direction in any particular case where the counsel, complaining of the conduct of the Judge at the trial, either does not or cannot point out any specific ground of misdirection or non-direction.

The only objections taken by the plaintiffs' counsel at the trial to the charge of the learned Judge are not available as against the finding of the jury on the particular questions submitted for their determination.

Had the jury found that the sale was not in the terms of the original order, but as altered by the alleged subsequent agreement between Lawrence McDermott and Ingham, we should have had to consider the question whether Ingham was an agent within the meaning of the Factors' Act, Consol. Stat. C. ch. 59 : see *Hays* v. *O'Connor*, 21 U. C. R. 251 ; *Hatfield* v. *Phillips*, 14 M. & W. 665 ; *Baines et al.* v. *Swainson*, 8 L. T. N. S. 536 ; *Heyman* v. *Flewker*, 13 C. B. N. S. 519 ; *Lamb* v. *Attenborough*, 1 B. & S. 831 ; *Cole* v. *North Western Bank*, L. R. 9 C. P. 470 ; S. C. L. R. 10 C. P. 470 ; whether the plaintiffs had not by their conduct enabled Ingham to hold himself forth to the world as being the owner of the stone so as to bind the plaintiffs by the sale of it : see *Dyer* v. *Pearson*, 3 B. & C. 38 ; and whether under the circumstances there was not an implied power to him to sell : see *Pickering* v. *Busk*, 15 East 38 ; *Gunn* v. *Gillespie*, 2 U. C. R. 151 ; *Brady* v. *Todd*, 7 Jur. N. S. 827. The finding of the jury has, however, relieved us from the consideration and determination of any of these questions in the present case.

There is no specific statement in the rule of the alleged improper reception or rejection of evidence. Nothing was said in support of this part of the rule at the argument. We are unable to discover any evidence which can be rightly said to have been improperly received or rejected.

Besides it is now provided that a new trial shall not be

granted on the ground of misdirection or the improper reception or rejection of evidence unless, in the opinion of the Court in which the application is made, some substantial wrong or miscarriage has been thereby occasioned: 37 Vic., ch. 7, sec. 34, O. See also *Smith* v. *Murphy*, 35 U. C. R. 569.

This brings us to the consideration of the remaining grounds stated, which are, that the verdict is contrary to law and evidence and the weight of evidence, and the ground of discovery of new evidence disclosed in affidavits.

The jury were under no obligation to believe the testimony of Lawrence McDermott. His evidence conflicted with the documentary evidence and there were other circumstances that might well cause a jury to discredit it. It was for the jury to form their judgment upon the whole complexion of the case. Even if there were nothing directly against the testimony of Lawrence McDermott, we could not say as a matter of law that the jury were bound to believe him See *Lane et al.* v. *Jarvis*, 5 U. C. R. 127. It might have been if he had been personally present and subjected to cross-examination in their presence he would have gone so satisfactorily through the ordeal as to have convinced the jury of the truth of his testimony.

We cannot say that the finding of the jury on the question of fact submitted to them was against law, evidence, or the weight of evidence.

The only remaining question is, whether we should give relief to the plaintiffs on the grounds disclosed in the affidavits filed.

There are two affidavits filed by the plaintiffs.

The first is that of *William McDermott*, one of the members of the plaintiffs' company.

He swears that at the time of the trial it would have been very inconvenient and expensive for the plaintiffs to have procured the attendance of Lawrence McDermott at the trial: that at the time of trial the place of residence of Ralph Ingham was unknown to the plaintiffs: that since

the trial he has learnt that Ralph Ingham is now resident at the town of Winnipeg, in the Province of Manitoba, and is willing to give evidence as to the nature of the transactions between him and defendant respecting the stone: that the same will corroborate the statements made by Lawrence McDermott as to the stone: that the plaintiffs were taken by surprise by the evidence of the defendant given at the trial; and that even if a new trial be granted, it is the intention of the plaintiffs to procure the evidence of Ingham and Lawrence McDermott to be taken at the trial if possible, and to use every effort to have the facts as to the disposition of and transactions connected with the stone between plaintiffs and Ingham and Ingham and the defendant placed before the Court.

The second is that of *Ralph Ingham.*

He swears to the truth of Lawrence McDermott's evidence, and in denial of the defendant's testimony, that he was not instructed to sell or pledge the 996 feet, and did not do so to the defendant or to any other person, but when he left Toronto he left the stone where he had placed it at the request of the plaintiffs, and the statement by the defendant to the effect that he told him the stone was his own or that he had authority to pledge it is untrue: that he never did pledge or otherwise convey, sell, or assign the said stone to the defendant, but on the contrary left it where he had first placed it, and where he held it to the plaintiffs' order and that defendant never had anything to do with the stone.

The defendant in answer has filed his own and several other affidavits. He reiterates the testimony which he gave at the trial, and is to some extent corroborated by other affidavits which he filed.

All that the plaintiffs propose to do if granted a new trial is to adduce Lawrence McDermott as a witness at the trial, and to corroborate his testimony by that of Ingham, either examined as a witness at the trial or examined under a commission.

The mere intention to adduce a witness at the trial

whose evidence at a previous trial taken under a commission was read to the jury is, of course, no ground for a new trial.

Nor is the fact that the plaintiffs, if granted a new trial, can by newly discovered evidence corroborate the testimony of the witness whose evidence has already been submitted to the jury, a ground for a new trial.

In *Scott* v. *Scott*, 9 L. T. N. S. 454, 456, Wilde, J., said, "It has never been the habit in Westminster Hall to grant a new trial on the simple ground that the party could make the case stronger by corroborating testimony (even though newly discovered) if another trial were allowed. And if it were otherwise there are few cases that would not be tried a second time."

The language of the Judge Ordinary in *Scott* v. *Scott* has been approved and followed in *Fawcett* v. *Mothersell*, 14 C. P. 104, and *Regina* v. *McIlroy*, 15 C. P. 116.

I approve of it and must follow it in this case. I have the less hesitation in doing so because I think a new trial if granted would have no different result to the one already had.

The rule must be discharged with costs.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

WILSON ET AL. V. MASON—LAMB V. WILSON ET AL.

Sale of Goods—Excessive demand—Right to recover back excess—Money had and received—Money paid.

The defendant, assignee in insolvency of L. & Co., advertised the whole estate for sale, consisting of a wholesale stock of groceries, &c., and a distillery and plant, which were specified in the advertisement in parcels, with the supposed value of each, the total being said to be about $51,000. He had an inventory prepared, which professed to give the cost price, and the advertisement invited tenders "at so much in the dollar on inventory price," to be paid in three equal quarterly instalments, or five per cent to be allowed off for cash. Most of the goods were then in bond. W. & Co., on the 12th of January, 1875, tendered for the whole stock, "as per inventory, the sum of 76¼ cents on the dollar, payable in cash after having checked over the stock and found it correct." On the next day, at a meeting of creditors, the assignee was instructed to accept this offer,,and he wrote to W. & Co., accepting it, repeating the offer almost in their words. Afterwards, acting under the orders of certain creditors, the assignee refused to deliver the goods to W. & Co., unless they would pay the duty as well as the 76¼ cents on the $51,000; and to obtain the goods, W. & Co. had to pay $43,000, being about $1.500 more than they would owe according to their offer, without the duty.

Held, that looking at the advertisement, tender, and acceptance, W. & Co. were not bound to pay the duty; and that the payment by them was not a voluntary one, so as to prevent them them from recovering back the excess as money had and received.

W. & Co., to obtain possession of part of the distillery plant which was affixed to the distillery, had to expend money in order to remove it:

Held, recoverable as money paid.

THE rules in these two cases were argued at the same time.

In *Wilson et al.* v. *Mason*, which was tried at the last Spring Assizes for the County of Brant, before Burton, J., the declaration was on the common *indebitatus* counts for work done, money paid, and money had and received; and the pleas were never indebted, payment and set-off.

The plaintiffs recovered a verdict for $1,590.60.

John J. Mason, the defendant, was the assignee of the estate of William M. Lottridge & Co., insolvents. The estate consisted of groceries, book debts, a distillery and plant. The assignee had an inventory prepared. It professed to give the cost price. Thus, for example, 35 dozen pails at $1.93: $86.85; 95 lbs. bi-car. soda at $5.35: $5.08. Afterwards the assignee published the following advertisement:—

"Wholesale stock of groceries, tobaccos, wines, liquors, and sundries. Tenders wanted. Tenders will be received by the undersigned up to Saturday, the 9th day of Jan. next, inclusive, for the purchase of the extensive and eligible stock of groceries, tobaccos, wines, liquors, and general goods, belonging to the insolvent estate of W. M. Lottridge & Co., Hamilton.

Parcel 1.—Distillery plant, manufactured and unmanufactured stock, &c., about $4,700.

Parcel 2.—Foreign and domestic liquors and wines, exclusive of duty, about $11,100.

Parcel 3.—Teas, coffees, sugars, tobaccos, cigars, rice, and raisins, about $17,200.

Parcel 4.—Canned goods, syrups, sodas, starch, currants, pickles, nuts, nutmegs, and sundries, including shop furniture, about $18,000. Total about $51,000.

The stock is in good order, is, comparatively speaking, new, has been well bought, and is well worthy the careful inspection of intending purchasers.

Tenders are to bid at so much on the dollar on inventory price, and will be received for each parcel separately, or for any or all of them combined, and are to state security, if time is required.

Purchase money to be paid in three equal quarterly instalments, or five per cent. will be allowed off for cash.

Stock sheets may be seen at the assignee's office, in Hamilton, or at the office of Messrs. Murdoch & Donaldson, 45, Front street east, Toronto.

Further particulars may be obtained on application to the undersigned. J. J. Mason, assignee.

Hamilton, 29th Dec., 1874."

The greater portion of the goods were at the time of the publication of the advertisement in bond. The quantities and values stated in the advertisement were assumed, but not correct as afterwards appeared on the taking of stock. There were tenders received from nine persons. There were three tenders for the whole, viz.: Wilson, Secord, and Smith & Keilly. Wilson's was the highest. It was in writing and as follows :—

Dundas, Jan. 12, 1875. J. J. Mason, Esq., assignee estate W. M. Lottridge & Co., Hamilton. Dear Sir :—We hereby tender for the whole stock of the insolvent estate as per inventory, the sum of 76¼ cents on the dollar, payable in cash, after having checked over the stock and found it correct. Yours, respectfully, (Signed) R. T. Wilson & Co.

The tenders were opened at a meeting of the inspectors, held on 13th January, 1875. On the same day there was a meeting of creditors. It was at the last mentioned meeting moved, seconded, and carried, that the assignee be instructed to accept the offer of R. T. Wilson & Co. of 76¼ cents in the dollar for the whole stock, cash. In accordance with this resolution the assignee wrote to Wilson & Co. the following letter :—

Hamilton, Jan. 13, 1875.—To Messrs. R. T. Wilson & Co., Dundas. *Re* W. M. Lottridge. Dear Sirs.—I am instructed to accept your offer of seventy-six and one quarter cents in the dollar for the whole stock of the insolvents, as per inventory, payable in cash, after having checked over the stock and ascertaining the amount thereof. Yours truly, J. J. Mason, assignee.

It was, however, understood that the assignee should endeavour to get the duties in full by making a request for them to Wilson & Co., but in the event of their refusal the assignee was to give the goods without the duties being paid, that is upon the 76¼ cents on the inventory.

Afterwards, on the 14th January, 1875, certain of the creditors, including Messrs. Lamb & Cross, ordered the assignee that the tender of Wilson & Co. be not accepted unless it be clearly understood by Wilson & Co. that the 76¼ cents shall be calculated on the sum of $51,000 or thereabouts, *and that the duty payable on such stock* shall be paid by the purchasers in full *in addition* to the amount of 76¼ cents on the $ on the $51,000. The assignee, Mason, thereupon on 14th January, 1875, addressed a letter to Wilson & Co. notifying them that he had on that day received notice from certain of the creditors of the estate of W. M.

Lottridge & Co. not to accept Wilson & Co's. tender for the stock unless the 76¼ cents be calculated upon the sum of $51,000 or thereabouts, and that the duty payable on such stock shall be paid by the purchaser in full *in addition* to the amount of 76¼ cents on the $ on the $51,000. Afterwards Wilson & Co. called and demanded the stock on the basis of their tender. The assignee thereupon took advice of a solicitor. In consequence of the advice he then received, he, on 16th January, 1875, telegraphed Wilson & Co. that he was prepared to commence delivering the Lottridge stock. Afterwards, on 28th January, 1875, Messrs. Lamb & Cross addressed a letter to the assignee offering to pay for the estate of W. M. Lottridge & Co. the sum of $50,000 in cash, and to assume the position of the assignee in regard to the sale of stock to Wilson & Co., and to indemnify the assignee against any claim on the part of Wilson & Co, it being expressly understood that in making this offer Lamb & Cross were to assume the payment of duties. The offer of Lamb & Cross was on the same day accepted by the creditors. In the inventory appears the following analysis of stock :—

Amount of stock	$52,138 20	
Empty barrels, &c	105 86	
Shop furniture	336 21	
Horses, harness, and buggies	222 00	
Making		$52,802 27
Distillery—		
50 brls low wine	1,154 64	
Empty brls	361 40	
Syrups, Ext. Flavouring and Sundries	284 32	
Copper still, boiler tanks, connections, &c	3,404 00	
		5,204 36
Making		$58,006 63
Less amount due bonds		7,420 78
		$50,585 85

Brought forward		$50,585 85
250 gal., 31½ O.P., 338 gal. proof low wine at 25c	$82 00	
Duty paid on 328 gals. at 75	246 00	328 00
Total		$50,913 85
Gin, 437½ at $1.23		546 88
Grand total		$51,460 73
Upon the stock being taken the goods as per inventory were found to be	$58,334 63	
Less deficiency, $1,005 61		
Error 12.60	1,018 21	
		$57,316 42

This was the sum as per inventory which, according to Wilson & Co's. contention, they were to pay for at the rate of 76¼ cents.

This would be on $57,316 42	$43,703 77
5 per cent. for cash	2,185 18
	$41,518 59

The assignee ultimately refused to deliver the effects to Wilson & Co., and in order to procure possession Wilson & Co. were constrained to pay, on the 30th January, 1875, the assignee $43,000 in cash. But this amount was received by the assignee without prejudice to the right of Wilson & Co., and without prejudice to the right of the assignee to recover from Wilson & Co. any further sum which the assignee might be entitled to claim from them. Thereupon the assignee delivered the goods, &c., to Wilson & Co. The plant, &c., in the distillery was part built in, and part not built in. In order to remove the part built in part of the wall had to be removed. Wilson & Co. saw the advertisement and inventory before tendering. The inventory was given to them so that they might

examine the stock and compare it with the prices charged. The inventory shewed the cost price to Lottridge including duties in all cases except one, and that was 50 barrels of highwine, which were entered at the bonded price, 32½ cents. On this the duty was 75 cents per gallon. This Wilson & Co. admitted to have bought at the short price, *i.e.* not including duties.

There were duties claimed by the Government upon goods not in stock. For example, there was only one puncheon of rum containing nine gallons. The value of it was $2.28 per gallon. But the sum claimed for duties on rum was $150. The inventory contained similar cases, but none so glaring. It cost Wilson & Co. about $150 to get delivery of the plant in the distillery which was built in.

It was proved in the action of *Wilson et al.* v. *Mason*, that a firm of Simpson, Stuart & Co., although not joined as plaintiffs, were jointly interested with Wilson & Co. in the purchase.

A nonsuit was moved, on the grounds: 1. That Simpson, Stuart & Co. were not plaintiffs, and that before any amendment could be made the written consent of each partner was necessary. 2. That there was a voluntary payment with full knowledge of the facts, and that the action therefore was not maintainable. 3. That there was no right to recover the $150 paid in order to get out the distillery plant. 4. That the goods were in bond, subject to the payment of duty, and that in construing the contract it must be held to refer to the $51,000, there being no stipulation on the part of the assignee to pay the duties.

The learned Judge, on the written consent of James Simpson, one of the partners of Simpson, Stuart & Co., who signed his own name as well as the name of Jas. M. Stuart, the other partner, allowed them to be added as plaintiffs. Subsequently the written consent of each partner was filed.

Leave was reserved to move to enter a nonsuit on the remaining objections, which for the time were overruled.

The learned Judge entered a verdict for the plaintiff

for $1,590.60 with leave to defendant to move to enter a nonsuit, or to enter a verdict in his favour, or to reduce the verdict to such sum as the Court upon the evidence should see fit, or for the plaintiffs to move to increase it by the sum of $100. The amount of the verdict was thus arrived at:

76¼ cents on.....	$57,269	22 =	43,667	78
Paid	43,000	00		
Less 5 per cent.....	2,183	38 =	45,183	38
			1,515	60
Amount expended in removal of distillery fixtures.....			50	00
			1,565	60
Interest.....			25	
Verdict.....			1,590	60

Lamb v. *Wilson et al.* was an action brought by the plaintiff as assignee of Mason, the assignee of Lottridge & Co., to recover the 5 per cent. discount for cash, and in respect of duty beyond the amount of $43,000 paid by Wilson & Co. to Mason. It came on for trial during the last Summer Assizes for the County of York before Galt, J., without a jury. The facts, substantially as already stated, were admitted.

The questions in dispute were:—1. Whether the defendants were entitled to claim 5 per cent. discount for cash. 2. Whether the defendants were entitled to recover the stock at 76¼ cents on the dollar, treating the duty as paid, and including the duty in the price, as is done in the prices stated in the inventory, or whether they were to be called on to pay the duty in full, that is to say, to deduct from the total amount in the inventory the amount of duty unpaid as is done in the inventory book, and to pay 76¼ cents on the amount of stock and duty in full.

The plaintiff Lamb claimed that the latter was the true meaning of the contract. The defendants asserted the contrary. The difference was $492.

The learned Judge found that the defendants, on the true construction of the contract, as evidenced by the advertisement, the letter of Wilson & Co., of 12th January, 1875, and the acceptance thereof dated 13th January, 1875, were entitled to claim the 5 per cent. discount for cash, and that the price must be calculated on the prices shewn by the inventory. He accordingly nonsuited the plaintiff, reserving leave to him to move to enter a verdict for both or either of the above sums.

In Easter term, May 25, 1875, *Snelling*, in *Wilson et al.* v. *Mason*, obtained a rule calling on the plaintiffs to shew cause why the verdict for the plaintiffs should not be set aside and a nonsuit entered on grounds taken at the trial, or why the verdict, if allowed to stand, should not be reduced to such sum as the Court should think fit on the evidence, and on the ground that the plaintiff's declaration will not support the claim of the sum of $150 mentioned in the plaintiffs' particulars, and on the ground that the sum of $7,159.82 mentioned in the defendant's particulars of set-off, or a smaller sum, is payable by the plaintiffs for duties on the goods purchased by them, pursuant to leave reserved at the trial, and on the law and evidence pursuant to The Law Reform Amendment Act.

In Trinity term, August 24, 1875, *Snelling* obtained a rule in *Lamb et al.* v. *Wilson et al.*, calling on the defendants to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiffs for the sum of $2,404.22, on the ground that the defendants are not entitled to deduct the sum of $1,515.60 discount for cash mentioned in the particulars of set-off from the amount claimed by the plaintiffs for goods purchased by the defendants, and on the ground that the sum of $7,159.82 mentioned in plaintiffs' particulars, is payable by the defendants for duties on the goods purchased by them; or why the verdict should not be entered for the plaintiffs on the latter ground for the sum of $492, pursuant to leave reserved at the trial, and on the law and evidence, pursuant to The Law Reform Amendment Act.

In Michaelmas term last, November 30, 1875, both rules were argued together.

Robertson, Q.C., shewed cause and after stating the facts and the finding in each case, submitted that Wilson & Co. were entitled to have the deduction of 5 per cent. for cash and to have the goods free of duty.

Snelling, contra, argued that the payment of $43,000 was voluntary, and that it was not paid under protest: *Marriot* v. *Hampton*, 2 Smith's L. C. 395; *Newall* v. *Tomlin*, L. R. 6 C. P. 405, 410; *Kendal* v. *Wood*, L. R. 6 Ex. 243; *Clare* v. *Lamb*, L. R. 10 C. P. 334. If Wilson & Co's. tender be read with reference to the advertisement, they are entitled to the 5 per cent., but take one of the parcels exclusive of duties, and if read without reference to it, there is no right to the deduction of 5 per cent. for cash.

February 4, 1876, HARRISON, C.J.—The claim of Wilson & Co. consists of three parts: first, $1,515.60, being the amount paid beyond the sum which they contend they were liable to pay for the effects which they bought; second, $50, being a portion of the $150 which they were forced to pay in order to detach the distillery plant from the building and get possession of the same; third, $25 interest on the foregoing sums.

No objection was made to the payment of interest if Wilson & Co. be entitled to recover the larger sums in respect of which the interest is claimed.

The first part of Wilson & Co's. claim is resisted on the grounds: 1. That by the contract they bought short and should pay the duties on the goods in bond, being an amount exceeding the alleged excess of payment. 2. That the payment was voluntary and not under protest.

The contract may be gathered from the advertisement, the tender, and the acceptance of the tender.

The advertisement asks for tenders up to 9th January, 1875, *on inventory price*, and it is therein stated that five per cent. will be allowed off *for cash*.

The tender of Wilson & Co. was not sent in till after the 9th of January, 1875. It was therefore competent for the assignee to have refused to receive it. But notwithstanding the lapse of time he did receive it, and afterwards with the consent of the creditors accepted it.

The tender is for the whole stock as *per inventory*, and the sum tendered is 76¼ cents on the dollar, payable in *cash*, after having checked over the stock and found it correct. It is proved by Wilson & Co. that they made the tender in consequence of the advertisement. In this view they assumed that on paying cash there would be the discount of 5 per cent. and to this view the assignee at the time assented. So far there was an agreement as to terms.

The basis of the tender was the price in the inventory. This is also the basis of the advertisement. It is true that in the advertisement, in the description of the foreign and domestic liquors and wines, the gross value is stated to be $11,100, "exclusive of duty." But these values, according to the evidence and the subsequent dealings between the parties, were only approximate. The tender of Wilson & Co. must be taken to be 76¼ cents on the prices stated in the inventory and subject to the deduction of 5 per cent. if cash were paid.

The next question is, whether this tender was accepted? The acceptance was of "the offer of 76¼ cents in the dollar for the whole stock of the insolvent *as per inventory*, payable in cash, after having checked over the stock and ascertaining the amount thereof." There was an acceptance almost in the words of the offer. No new term of any kind is introduced into the acceptance. The offer is to pay "after having checked over the stock and found it correct." The acceptance is for payment "after having checked over the stock and ascertained the amount thereof." The expressions in the tender and acceptance in this particular are equivalents.

It is not pretended by the assignee that he understood the tender in any sense different to that in which it was

understood by Wilson & Co. Their minds were therefore perfectly *ad idem.* Between them there was a perfect contract of sale. See *Chinnock* v. *The Marchioness of Ely*, 4 DeG. J. & S. 638; *Smith* v. *Hughes*, L. R. 6 Q. B. 597; *Riley* v. *Spotswood*, 23 C. P. 318; *Smidt* v. *Tiden*, L. R. 9 Q. B. 446.

Some of the creditors desired, if possible, to force Wilson & Co to pay more than they intended to pay when they tendered, and more than the assignee intended them to pay when he accepted the tender. But, notwithstanding this desire on the part of some of the creditors, there was a complete contract between the assignee and Wilson & Co. It was the performance of this contract that Wilson & Co. demanded. They only procured the performance under the pressure of the exaction of the payment of $43,000, which sum was paid without prejudice to the rights of either party.

The sale of goods at a certain price named intends the sale of them at that price free from incumbrances. The duty was an incumbrance. And unless at the time of the sale it was stipulated that the purchaser should pay the incumbrance, it is the duty of the seller to do so. See *Brown* v. *Cockburn et al.* (*a*). In this case I do not think there was any such stipulation. The price agreed to be paid for the goods was 76¼ cents in the dollar on the prices named in the inventory, and not the prices named in the inventory *plus* the dues to the Government.

It is not necessary to consider the question whether the contract is wholly evidenced by the writing, for Wilson & Co. are not suing on the contract, but only referring to it as introductory to their right to recover money which they say in justice and equity belongs to them, and which was received by the assignee under such circumstances as to render the receipt of it a receipt to the use of Wilson & Co. The foundation of their claim, so far as the sum of $1,515. 60 is concerned, is the count for money had and received to

(*a*) Ante 37 U. C. R. 592.

which the contract is merely introductory. See *Cocking* v. *Ward*, 1 C. B. 858.

It is competent for parties, independently of the provisions of the Statute of Frauds, to make a contract proved partly by writing and partly by oral testimony: *Goss* v. *Lord Nugent*, 5 B. & Ad. 58. See also *Sanderson* v. *Graves*, L. R. 10 Ex. 234.

If Wilson & Co. are entitled to recover the $1,575.60, it is because it is against justice and equity for the assignee to hold the money, and not because of any suit brought by them on the contract of sale.

We, therefore, come to the conclusion that Mr. Justice Burton and Mr. Justice Galt were right in their ruling as to the contract and that there was no legal obligation on the part of Wilson & Co. to pay and no legal right in the assignee to receive the $43,000, and unless the payment of the excess can be said to be voluntary within the meaning of the cases cited by Mr. Snelling, Wilson & Co. are entitled to succeed in *Wilson et al.* v. *Mason*, and Lamb must fail as regards the amount claimed for duty in *Lamb* v. *Wilson*.

This brings us to the question whether under the circumstances the payment can be said to be voluntary, so as to prevent its recovery in an action for it as for money had and received.

The action for money had and received was first made an action of great practical utility and of wide practical application by Lord Mansfield.

In *Moses* v. *Macferlan*, 2 Burr. 1012, that illustrious Judge, speaking of it, said: "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal

interest upon an usurious contract, or, for money partly lost at play; because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under these circumstances. In one word, the gist of this action is, that the defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money."

I am aware that later Judges have in some respects attempted to qualify this enunciation of the law, but looking to the course of modern legislation in England and here, the spirit of our laws would appear now rather to favour it than to oppose it.

In the present case three things are reasonably clear: 1. That by the contract of sale, although for the purpose of ascertaining the price the goods were to be checked, the property in the goods had passed to Wilson & Co.: *Turley* v. *Bates*, 2 H. & C. 200; *Martineau et al.* v. *Kitching*, L. R. 7 Q. B. 436; *Lockhart et al.* v. *Pannell*, 22 C. P. 597; *Ogg et al.* v. *Shuter*, L. R. 10 C. P. 159.

2. That under these circumstances Wilson & Co. upon tender of the right amount, might have maintained trover for the goods.

3. That in order to obtain possession of their property Wilson & Co. were forced to pay the assignee more than the latter under the contract, as we construe it, had any right to demand or receive.

To call a payment made under these circumstances a voluntary payment appears to me to be an abuse of language.

In *Astley* v. *Reynolds*, 2 Str. 915, in an action to recover money extorted under duress of goods, the Court held that the payment so far from being voluntary was one by compulsion, the Court saying "the plaintiff might have such an immediate want of his goods that an action of trover would not do his business."

In *Shaw et al.* v. *Woodcock*, 7 B. & C. 73, 84. in a similar action, Bayley J. said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter in order to obtain possession of his property pays that sum, the money so paid is a payment made by compulsion, and may be recovered back."

In the same case Holroyd, J. said, at p. 85: "If a party making the payment is obliged to pay in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary, but a compulsory payment, and may be recovered back."

In *Great Western R. W. Co.* v. *Sutton*, L. R. 4 H. L. 226, 249, Willes, J., said: "I must say I have always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received."

Reference may also be made in support of the same principle to *Pratt* v. *Vizard*, 5 B. & Ad. 808; *Clare* v. *Phipps*, 7 M. & G. 586; *Wakefield* v. *Newbon*, 6 Q. B. 276; *Neate* v. *Harding*, 6 Ex. 349.

The law might be held to be different if at the time the payment was made there was any undertaking or contract on the part of the person paying that he would not sue to recover the money back. See *Atlee et al.* v. *Backhouse*, 3 M. & W. 633; but no such case is made here. The contrary appears.

This disposes of *Lamb et al.* v. *Wilson et al.* in favour of the defendants. The rule to enter a verdict in that case must be discharged.

But in *Wilson et al.* v. *Mason* there still remains the question as to the right of the plaintiffs to recover $50 in respect of moneys paid by them to get possession of goods which the assignee was bound to deliver but refused

to deliver. Wilson & Co. seek to recover this amount either under the count for work and labour or the count for money paid. That the amount was paid there is no doubt. That it was necessarily paid is equally free from doubt. But the question is, whether it was paid under such circumstances that the law will imply a request on the part of the assignee.

It is certainly only just and equitable that the money should be repaid, and in some form of count, special or general, should be recoverable.

In *Exall* v. *Partridge*, 8 T. R. 308, Lord Kenyon is reported to have said, at p. 310: "It has been said that, where one person is benefited by the payment of money by another, the law raises an assumpsit against the former: but that I deny; if that were so, and I owed a sum of money to a friend and an enemy chose to pay that debt, the latter might convert himself into my creditor *nolens volens*."

In *Child* v. *Morley*, 8 T. R. 610, the same learned Judge is reported to have said, at p. 613: "I admit that no man can by voluntary payment of the debt of another make himself that man's creditor, and recover from him the amount of the debt so paid, but what pressed on my mind was, that the plaintiff was under some sort of compulsion to pay the differences. * * * I considered that his paying the differences under such circumstances was not altogether a voluntary act, but done *under the pressure of a situation* in which he was involved by the defendant's *breach of faith*."

In *Lewis* v. *Campbell*, 8 C. B. 541, 545, Maule, J., during the argument said: "Where money is received under circumstances which make it right and equitable that it should be returned, it may be recovered, back in an action for money had and received. May it not also be said, that, where money has been paid under circumstances which make it just and equitable that it should be repaid, it may be recovered back on a count for money paid."

The money here was not paid officiously and without

reason. It was paid under the pressure of the situation in which Wilson & Co. found themselves by reason of the assignee's attempted breach of faith. The effects by the sale had become the property of Wilson & Co. It was the duty of the assignee to deliver possession on payment or tender of the price, and to do whatever was necessary to make a delivery. Wilson & Co. had done all that was necessary to entitle themselves to a delivery, and were ready to receive. The obstacle in the way of the delivery of the distillery plant was that a portion of it was affixed to the distillery. It was the duty of the assignee, at his own expense, in order to a delivery, to have removed that difficulty. In bad faith he refused to do so. Wilson & Co. under these circumstances were compelled to expend about $150 to do that which the assignee was bound to do. I cannot think under these circumstances that the payment is to be looked upon as a voluntary payment. I rather think that it is to be looked upon as a payment made under compulsion and under such a state of facts as to make it our duty to imply the request.

This ruling is more in accordance with the principles of the cases to which I have referred than would be a contrary ruling. The mere fact that there is no case precisely in point is no reason against the ruling.

The law of England would be a strange science indeed if it were decided on precedents only. Precedents serve to illustrate principles and to give them a fixed authority, but the law of England which is exclusive of positive law enacted by statute depends upon principles, and these principles run through all the cases, according as to the particular circumstances of each have been found to fall within the one or the other: per Lord Mansfield in *Jones* v. *Randall*, Cowp. 37.

We are, however, not blind to the importance of precedents. If there were any binding authority against holding that the action for money paid is maintainable here, we should follow it till a different rule were laid down by some Court having authority to overrule it, or by action of

the Legislature. But we know of no such authority, and in the absence of direct authority must hold in favour of the action, in accordance with what we take to be the dictates of reason, justice, and equity.

Some persons on the authority of *Spencer* v. *Parry*, 3 A. & E. 331, suppose an action for money paid will not lie unless the effect of the payment be to relieve the defendant from some liability. But such a limitation is expressly repudiated in *Brittain* v. *Lloyd*, 14 M. & W. 762; and the latter is approved in *Hutchinson* v. *Sydney*, 10 Ex. 438, and has never since met with disapproval. We therefore hold that the $50 is recoverable in this case on the facts proved as money paid. We think the rule in *Wilson et al.* v. *Mason* must also be discharged.

MORRISON, J., and WILSON, J., concurred.

Rules discharged.

SCOTT v. DENT.

Building agreement—Liquidated damages for delay—Pleading.

Plaintiff, by deed, agreed to build a house for defendant for $1,150, by a day named, and that for each day that should elapse after that day until completion, defendant might deduct $5 from the contract price.

Held, that the sum of $5 per day was liquidated damages, not a penalty, and that it might be deducted from the contract price, without pleading it specially by way of set-off.

Remarks as to the effect of the finding of a Judge upon evidence.

THIS was an action brought by the plaintiff, a builder, to recover the price for erecting a house for the defendant in the village of Seaforth.

The first count of the declaration was on a contract under seal made between the parties for the erection by the plaintiff for the defendant, in the village of Seaforth, of a house, according to plans and specifications, to the satisfaction of the defendant or his superintendent, by 20th May, 1874, for the sum of $1,150, payable as follows:—$200 when the roof was completed; $300 when the plastering was finished, and $650 when the whole work was

satisfactorily completed. The plaintiff admitted that he did not complete the house by 20th May, 1874, nor until a short time thereafter, but averred that he did within the further time complete the same, and defendant accepted but did not pay for the same.

There were also the common counts for work and labour, &c.

The pleas were, to the first count:

1. *Non est factum.*

2. That the plaintiff did not erect the house nor complete the same in the manner and in accordance with the specifications, nor to the satisfaction of the defendant or his superintendent, nor did defendant accept the same.

3. Payment.

And to the remainder of the declaration:

1. Except as to $89.60, never indebted.

2. As to $89.60, payment into Court.

3. Except as to $89.60, payment.

Issue.

The cause was tried at Goderich in the fall of 1874 before Strong, J., without a jury.

The contract was put in and admitted. It was made in October, 1873. It provided, among other things, for the best three coat plastering; it also provided that the frame, might be put up, the roof put on, and the rough inside sheeting at any time when the weather was suitable, between October, 1873, and 1st March, 1874: that no plastering was to be done until the spring frost was past; that the whole work was to be completed by 20th May, 1874; and that "for each day that shall elapse after the 20th day of May, 1874, until said work is completed, the proprietor *may deduct* $5 from the amount of contract" price. The price was $1,150, payable as set out in the first count of the declaration.

The plaintiff admitted to have received $705.40 on account, and sued for the balance, as well as for a claim of $23 for extras.

The evidence as to the plastering was conflicting, but

the weight of evidence shewed that it was not at all according with the contract, and that the work was not completed till after the 13th July, 1874.

The defendant represented that he from time to time complained of the delay. This the plaintiff denied, saying there were no such complaints, and that the delay arose in great part because the spring frosts were late in 1874.

An architect was examined, who shewed that deductions ought to be made from the work for defective plastering to the amount of $85.74.

The amount claimed to be deducted by the defendant for 54 days' delay was $270. The amount paid into Court was $89.60.

Under these circumstances defendant submitted he had paid all that he was bound to pay under the contract, and that he was not liable to pay anything for extras.

The learned Judge, after reserving his decision, found defendant entitled to a deduction of $85 in respect of the work insufficiently done, and $270 for the delay in the completion of the work by the time specified in the contract. But as there was no plea of set-off, and no amendment asked, he entertained some doubt as to whether the deduction was a proper subject of recoupment, as distinguished from set-off; but his opinion inclined in favour of the defendant. He thought that the deduction stood on the same principle as work insufficiently done; that the contract expressly stipulated that defendant might deduct from the amount of the contract, so that it is a deduction from price, and seems to be as if the contract had fixed the price at $1,150, if the work was completed by the 20th May, and $270 less if not completed till 13th July. He found in favour of the defendant's right to the deduction, notwithstanding a contention on the part of the plaintiff that he could not complete by 20th May, in consequence of the spring frosts, because the learned Judge construed the contract as requiring completion at all events by 20th May, 1874, and there was nothing to show that spring frosts were as late as that the date. He, however, found the plaintiff entitled to $18 for

extra work, and as $705.40 had been paid before action, and $89.60 since action, he made the account stand as—

Contract price (subject to deductions)...		$1,150
Paid before action.....	$705.40	
Deductions for delay.....	270.00	
Deductions for bad work.....	85.00	
Paid into Court.....	89.60	
		1,150

and so the verdict was for the plaintiff for $18.

The learned Judge thought there was no room for any question as to the $5 a day being liquidated damages, and not a penalty.

In Michaelmas term, November 21, 1874, *F. Osler* moved for, and on June 2, 1875, obtained a rule calling on the defendant to shew cause why a verdict should not be entered for the plaintiff for a larger sum, on the grounds:

1. That the evidence shewed that the defendant was not entitled to deduct from the plaintiff's claim $5 per day as liquidated damages for 54 days; but if at all, for a much shorter time.

2. That the work was completed before the 18th July, 1874, and, at all events, before the expiration of 54 days from 20th May, 1874.

3. That on the legal construction of the contract, the pleadings and evidence, the defendant was not entitled to any deduction as for liquidated damages.

4. That the plaintiff was prevented by the defendant from completing the contract sooner than it was done.

During this term, February 23, 1876, *C. Robinson*, Q.C., shewed cause. As to the amount to be deducted for liquidated damages, that was a question of fact for the learned Judge sitting as a jury, and the evidence was wholly conflicting. As to the contract, the evidence is also conflicting, but the weight of evidence is, that the plaintiff was not delayed beyond the 20th May by the spring frosts. He cited *Fisher* v. *Berry*, 16 C. P. 23, as to the right to deduct the sum claimed for delay, without a special plea.

F. Osler, contra. The contract in effect forbids the plaintiff going on with the plastering until the "spring frosts" were over, and there is strong evidence they had not disappeared until after the time fixed for the completion of the work, 20th May.

March 17th, 1876. HARRISON, C.J.—We cannot in this case interfere with the finding of the learned Judge on the evidence.

The finding of a Judge is, at all events, to say the least of it, entitled to as much weight as the finding of a jury on facts, and the rule is not to set aside the verdict of jury as being against evidence or the weight of evidence, unless the Court is satisfied beyond doubt that the jury drew wrong conclusions from the evidence, or found against evidence, and this although the Judge who tried the cause would have been better satisfied with a different finding: *Mellin* v. *Taylor*, 3 Bing. N. C. 109; *Creighton* v. *Chambers*, 6 C. P. 282; *Brown* v. *Malpus*, 7 C. P. 185; *Nolan* v. *Tipping*, 1b. 524; *Arthur* v. *Lier*, 8 C. P. 180; *Scott* v. *Scott*, 9 L. T. N. S., 454; *Regina* v. *Chubbs*, 14 C. P. 32.

It is by 32 Vic., ch. 6, sec. 18, sub-sec. 2, O., declared that the verdict or finding of the Judge before whom any such issue shall be tried or damages assessed, "shall have the like effect as the verdict or finding of a jury," and there is this advantage in trial by Judge over trial by jury, that, whenever the verdict or finding of the Judge is moved against, the Court, instead of ordering a new trial, may pronounce "the verdict which, in their judgment, the Judge who tried the case ought to have pronounced:" 33 Vic. ch. 7, sec. 6., O.,

I do not mean to say that Judges may not, like juries, take erroneous views of evidence. Judges, like jurors, are no more than mere men, and men are fallible. But what I do mean to say is, that, while conceding the right to interfere, I think no Court should, in the exercise of discretion, interfere with the findings either of Judge or jury on facts, unless under the complete conviction that the Judge

or jury drew improper conclusions from the evidence. See *Cuno* v. *Cuno*, L. R., 2 Sc. App. 303. This rule, like any other general rule, must, however, be subject to some exceptions, but the exceptions should be well founded and rare.

Having read the evidence I am not on any question of fact prepared to dissent from the deliberate finding of the Judge in this case on the facts. Nor am I prepared in any manner to dissent from his finding on the points of law.

I think that the sum of $5 per day for delay after 20th May, 1874, was liquidated damages: *Gaskin* v. *Wales*, 9 C. P. 314; *McPhee* v. *Wilson*, 25, U. C. R. 169; *Archibald* v. *Wilson*, 32 U. C. R. 590; *Hamilton et al.* v. *Moore*, 33 U. C. R., 100; was properly computed from 20th May, 1874, and properly "deducted" from the contract price, according to the express stipulation to that effect contained in the contract.

The finding of the learned Judge shews that the plaintiff not having done the work either within the time or in the manner provided for by the contract, is not entitled to recover on the express contract or contract under seal, which is the foundation of the claim in the first count, but only, if at all, under the common counts on an implied contract, arising from acceptance: See *Oldershaw* v. *Garner*, post p. 52.

In considering the claim as advanced under the common counts, there would be, as it seems to me, the right not only to deduct because of insufficiency of work, but for delay in the doing of the work in accordance with the express agreement to that effect between the parties.

The latter deduction is, as said by Lord Mansfield in *Dale* v. *Sollett*, 4 Burr. 2134, a charge which makes the sum of money demanded so much the less.

It is, as said by Wilson, J., in *Fisher* v. *Berry*, 16 C. P. 27, as if the plaintiff had said: I will charge you $1,150 if I do the work by the 20th May, 1874, but only $880 if I do not do it till the 13th July, 1874; and again, Ib, 28, "The rule as to circuity of action as forcibly applies here as in

the other class of cases mentioned, and, perhaps, it is upon that ground only on which this defence can be set up without a special plea; for there may be no difference in principle between the case of a deduction on the ground of inferiority in value where nothing is said about an allowance being made for it, and a deduction from the price on any other account, when that deduction is specially agreed to as a part of the contract; just as we presume there is no difference between a deduction for inferiority in value when nothing has been said of it, and a deduction for such inferiority when it has been specially bargained for."

If the contract here were not under seal, *Fisher* v. *Berry*, 16 C. P. 23, would be a direct authority in favour of the ruling, for Mr. Justice Wilson, after reviewing the cases says, at p. 28: "According to the best opinion we can form, I think it was not necessary to plead the right to make this deduction; but that as a *deduction* it was admissible in evidence, in determining the amount of the plaintiff's right to compensation." And the fact that the contract is here under seal ought not to make any difference in the application of the principle.

If the plaintiff is entitled to recover under the contract under seal, that same contract gives the right to the deduction, and to the extent of the deduction by the express terms of the contract reduces the contract price.

So, if the plaintiff is entitled to recover on a parol contract on the terms of a sealed contract—See *McDonald* v. *The Canada Southern R. W. Co.*, 33 U. C. R. 313—that same contract also gives the right to the deduction, and to the extent of the deduction by the express terms of the contract reduces the contract price.

The agreement is an entire one. The plaintiff cannot in any form of action claim the benefit of it without giving to the defendant the benefit of the deductions, according to the terms of the agreement, whether under seal or not under seal.

In *Duckworth* v. *Alison*, 1 M. & W., 415, Parke, B., speaks

of the defendant as having a double remedy: either to set off the deduction as a payment, or to deduct it from the contract price.

If we were obliged to hold that the former, set-off, in this case is the proper and only remedy open to the defendant we should be equally obliged, under sec. 8 of 36 Vic., ch., 8, to make the amendment allowing a plea of set off although not asked at the trial, "for the purpose of the determining of the rights and interests of the respective parties." See *McGinnis* v. *Corporation of the Village of Yorkville*, 21 U. C. R. 163.

The rule must be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

OLDERSHAW ET AL. V. GARNER.

Building contract—Architect's certificate—Effect of taking possession.

The plaintiffs agreed in writing to build a house for defendant, for $10,405, $2,000 in advance, and the balance at the rate of 85 per cent. for the work fixed in its place, but no payment to be made without a written certificate from the architect; the remaining 15 per cent. to remain in defendant's hands for a month after the completion of the work, and also until all the defects which the architect should within that period certify to exist should be remedied. It was also agreed that no extras should be permitted or allowed unless agreed upon in writing, and that the writing should be produced before payment therefor. In an action to recover the 15 per cent., and for extras—

Held, that the certificate as to defects need not be in writing, that not being expressly required; and, there being evidence that the architect within the month verbally signified his dissatisfaction with certain specified defects, that the plaintiff could not recover.

Held, also, that there could be no recovery for extras claimed, no writing therefor having been produced.

The defendant having taken possession of the building, which was upon his own land, *Held*, that this could not entitle the plaintiffs to recover under the common counts. *Munro* v. *Butt*, 8 E. & B. 738, approved of and followed.

THIS was an action for mason's work done by the plaintiffs in the erection of a tavern and stores in connection therewith for the defendant, in the town of Chatham.

The first count of the declaration alleged that by agreement dated 2nd October, 1872, made between the parties, it was covenanted that the plaintiffs should, on or before the 15th of August then next, in a good and workmanlike manner, with the best materials of their respective kinds, execute and complete the whole of the excavation, stone, brick and plastering mentioned or described in the specifications and drawings referred to in the agreement, in conformity therewith, and the general instructions of one William Gonne, an architect, therein named; and that if at any time or times during the progress of the works any of the materials intended to be used therein by the plaintiffs should be considered unsound or improper by the said William Gonne, or by the defendant, or by any agent, clerk, or foreman of works, the plaintiffs would upon notice in writing immediately remove the same from the premises; and that if at any time or times during the progress of the building and works, or within one calendar month after the completion thereof, the defendant, his architect, superintendent or agent should consider the building or works unsound or improperly executed, the plaintiffs would upon like notice in writing, without making any extra charge whatever, immediately take down such unsound or improperly erected part or parts of the building or works and replace the same by sound and properly executed work; and that by the agreement the defendant covenanted to pay for the works and materials $10,405 as follows, viz., $2000 in advance, and the balance at the rate of eighty-five per cent. for the amount of work already fixed in its place, due notice having been given two weeks before by the plaintiffs to the architect or superintendent notifying the amount required, but no payment should be made without a written certificate from such architect or superintendent stating the actual value of the work then completed and the amount to be paid therefor, and such certificate should not in any way screen the plaintiffs from any liability incurred if improper materials should have been inadvertently passed; and that the balance of fifteen

per cent. should remain in the hands of the defendant after the payment of the $2000 as a security for the finishing of the work, and likewise as a guarantee for the good quality in all respects of the work, and the balance should remain unpaid for one calendar month next after the completion of the whole of the buildings or works, and also until all the defects which the architect or superintendent should within the same period from such completion certify to exist in the building or works should be completed at the expense of the plaintiffs. Averment, that the plaintiffs did in a good, substantial workmanlike manner, and with the best materials of their respective kinds, execute and complete the whole of the work in conformity with the agreement and with the general instructions of William Gonne, and more than one calendar month had expired since the completion before action, and the works were accepted by defendant and possession thereof taken by him and his tenants, and all conditions were performed, &c., to entitle plaintiffs to a performance of defendant's promise, yet the defendant has not paid the plaintiffs the fifteen per cent. after the payment of said $2000.

The remainder of the declaration consisted of the common money counts for work done, materials provided, &c.

The pleas to the first count were :

1. *Non est factum.*

2. Traverse of the alleged performance of the works in manner and form as alleged.

3. Traverse of any certificate of the architect as to the fifteen per cent., and of the alleged acceptance of the work.

4. Set-off as to, $300 or $25 per week liquidated damages for non-completion of the works within the time limited by the contract.

5. That the architect did, within one month after the alleged completion, certify defects, which were not before action remedied.

The pleas to the remainder of the declaration were :—

6. Never indebted. 7. Set-off. 8. Payment.

The plaintiffs joined issue upon the first, second, fifth, sixth, seventh, and eighth pleas, and upon so much of the third plea as denied acceptance of the building by defendant, and they demurred as to so much of the third plea as alleged the want of the architect's certificate as to the fifteen per cent.

The plaintiffs replied to the fourth plea that the work so contracted to be done was only that part of the work known as the mason's work, and the other portions of the work necessary to complete the work were under the control of the defendant, his agents, workmen, &c., large portions of which had to be done before the plaintiffs could carry on or complete their contract; and that the delay mentioned in the plea arose by reason of those portions of the works so to be done by the defendant, his agents, workmen, &c., not being sufficiently in progress.

The defendant joined issue on the plaintiffs' replication to the fourth plea.

The third plea, excepting so much as denies the acceptance of the building by the defendant, was by Mr. Justice Morrison sitting for the Court out of term, held bad in substance.

The issues in fact came on for trial before Galt, J., at the last spring assizes for Chatham, without a jury.

Besides the $490, being the 15 per cent. under the contract, the plaintiff claimed $40.37½c. for extra work besides interest.

The contract, which was under seal, was proved, and the material provisions of it were substantially the same as set out in the first count of the declaration and in the fourth plea.

The portion containing the promises on the part of the defendants was as follows:—

"And these presents further witness, that in consideration of the premises and of the stipulations hereinbefore contained, the party of the first part (the defendant) doth hereby covenant, &c., that he will make payments from time to time as follows, viz., $2,000 in advance, and the

balance at the rate of 85 per cent. for the amount of work actually fixed in its place, due notice having been given two weeks before to the architect, &c., notifying the amount required, but no payments shall be made without a written certificate from such architect, &c., stating the actual value of the work then completed and the amount to be paid therefor; and such certificate shall not in any way screen the parties of the second part (the plaintiffs) from any liability herein incurred if improper material or defective workmanship may have been inadvertently passed, or in case any damage may arise to the said building or works from fire or otherwise, previous to being taken out of the hands of the said parties of the second part. And it is hereby agreed that a balance of fifteen per cent. shall remain in the hands of the party of the first part after the payment of the said $2,000, as a security for the finishing of the said works, and likewise as a guarantee for the good quality in all respects of the whole of the work hereby contracted for, and the said balance shall remain unpaid for one calendar month next after the completion of the whole of the buildings or works, and also until all defects which the said architect, &c., shall within the same period from such full completion certify to exist in the buildings or works under this contract, or any part thereof as aforesaid, shall be completely remedied by and at the expense of the said parties of the second part."

The concluding clause of the agreement was, "that no additional work, or deductions, or extras of any kind, shall be permitted or allowed unless the same hath been agreed upon in writing, and the price of such work duly ascertained and embodied in such writing, and that the writings shall be produced before payment for the same shall be allowed," &c.

The plaintiff *Oldershaw* was called as a witness on his own behalf. It appeared from his testimony that he completed his work about the 8th of November, 1873; that he was delayed by the contractor for the carpenter work, and was also delayed in the start by the non-removal of

some old buildings by defendant. There was also a delay on the west side of the building owing to the non-removal of another building which required removal before the work could be proceeded with. He swore that if it had not been for these delays the work would have been finished within the time limited by the contract (15th August, 1873.) He proved the items in respect of extra work, and that the charges were reasonable. He admitted, on cross-examination, that he had no certificate from the architect of the work being finished to his satisfaction. He swore that he agreed with defendant that $500 was to be kept back till the work was finished: that the architect, Mr. Goune, said there were some finishings to be done in the spring, and when these were done the rest of the money would be paid; that the extra work, all except $3, was done about the building, but was not included in the contract. He admitted that he had been paid all the money under the contract except $490. He said defendant told him that he would retain the $500 until the finishings were done to the architect's satisfaction, and that he (plaintiff) agreed to this.

On re-examination, he stated that before he saw the architect about accepting the building, the architect admitted to him that the building was completed; that when he spoke to defendant about paying him for the building defendant was then in possession, and it was then he said he would retain the $500. This, he said, took place some time in the winter of 1873; he did not recollect the precise date. He swore that what defendant objected to was some cracks, and that he (the plaintiff) remedied them.

Otis B. Hulin, the co-plaintiff, was also called as a witness on behalf of the plaintiffs. In the main he corroborated the testimony of the preceding witness, but denied that there was any agreement to wait until the spring for the $500; that defendant said he would not give it, and the plaintiffs merely thought it better to wait than to have any trouble. He mentioned that it was more than two months after 8th November, 1873, that the plaintiffs asked for the money.

On cross-examination, the last witness admitted that there were some cracks to be filled up. He said they filled up some of the cracks before asking for the certificates; that after this, and before applying to defendant for payment, other cracks had appeared, and the cracks which they had filled up turned yellow; that defendant required the plaintiffs to fill up the new cracks and whitewash the old ones in the spring. He said that in the spring the plaintiffs filled up the new cracks and commenced to whitewash the old ones when defendant stopped them; that the reason the defendant stopped the whitewashing was because, as he said, the whitewash rubbed off.

Another witness, a plasterer, was called for the plaintiffs. He worked on the building for the plaintiffs. He swore he went there on 1st of August, but the job was not then ready; that the carpenters' work on the first, second, and third floors was not ready, and that the plasterers kept up with the carpenters the whole time. He considered the plastering a good job. He also swore that as the stores were finished defendant took possession of them.

This closed the case for the plaintiffs.

Counsel for the defence objected that it was not shewn that the work was done to the satisfaction of the architect; that the architect should himself have been called; and that it was shewn the architect did point out certain defects in the work which had not been remedied.

The learned Judge, for the time, overruled the objections.

The architect was then called as a witness for the defence. He swore the building was never entirely completed to his satisfaction: that the plastering was not satisfactory: that the plastering was never completed to his satisfaction: that he never said it was so: that if it had been he would have given the contractors a certificate: that he refused to give them a certificate; and that the reason of his refusal was because the plastering was not done to his satisfaction.

He stated that there was an agreement made on the 3rd

of February, 1874, between the plaintiffs and the defendant in his office; that the plaintiffs claimed there was $1,000 or $1,500 due to them; that the agreement was, that the plaintiffs were to leave $500 with the defendant till the plastering was made satisfactory; and that upon this agreement defendant gave his cheque for the balance then claimed in excess of the $500. But he mentioned that the plastering never was done to his satisfaction, and it would cost $250 to make it satisfactory.

On cross-examination, he said the work was completed on the 8th of November; that he called the attention of plaintiffs to some spots in the plastering: that in November he examined the building: that he was not then satisfied with the work: that he never said he was, but the contrary; and that on the 3rd of February, 1874, it was agreed the cracks were to be filled up and the plastering made satisfactory; that the agreement was that they were to stop the cracks and whitewash, and make the work satisfactory.

The learned Judge, after hearing the testimony of the architect, suggested that he, the learned Judge, should be allowed to render a compromise verdict by deducting the sum of $200 for the purpose of completing the work, but to this the parties would not agree.

The learned Judge thereupon rendered a verdict for defendant. He did so because he did not think the agreement under which the $500 was to be paid had been carried out by the plaintiffs. He found the agreement to be as stated by the architect.

The learned Judge reserved leave to the plaintiffs to move to enter a verdict in their favour for $537 if the Court should be of opinion that he ought to have found a verdict in favour of the plaintiffs.

The counsel for the defendant mentioned that he had evidence as to the cost of plastering, but the learned Judge said it was unnecessary to offer it, as he was called upon to decide on the simple question as to the $500 being payable at all under the agreement.

During Easter Term, May 21, 1875, *M. C. Cameron*, Q.C. obtained a rule calling on the defendant to shew cause why the verdict should not be set aside and a verdict for $537 entered for the plaintiffs, pursuant to leave reserved and the Law Reform Amendment Act; or a new trial had between the parties, said verdict being contrary to law and evidence, and for the reception of improper evidence, which was in admitting evidence of an agreement to alter the terms of the contract and dispense with the written certificate, said agreement being by parol and varying the deed, and because there was no plea under which such defence could be given if valid.

In Michaelmas Term, December 2, 1875, *C. Robinson*, Q. C., shewed cause. The plaintiff could not recover, either under the written contract or the subsequent oral one, unless the architect was proved to be satisfied with the work, and there was not only no architect's certificate, but the architect was called as a witness for the defendant, and swore he was not satisfied. On the authority of *Munro* v. *Butt*, 8 E. & B. 738, the defendant taking possession of his own buildings situate on his own land was not an acceptance of the work so as in any way to dispense with the performance of conditions precedent. He asked leave to be allowed to file a plea of the substituted agreement if deemed necessary.

M. C. Cameron, Q. C., contra. As to the fifteen per cent. no architect's certificate is under the contract necessary, and the original contract should not be allowed to be varied by the alleged subsequent oral agreement. There is no plea under which the oral agreement, if admissible, can be allowed to defeat the written contract. Unless there was a certificate from the architect within the time limited by the contract as to dissatisfaction, the plaintiffs are entitled to recover the fifteen per cent., and there was no evidence of any such certificate.

February 4, 1876.—HARRISON, C.J.—The plaintiffs' claim consists of three parts:

1. The 15 p. c. under the contract ...	$490	00
2. Extras	40	37½
3. Interest	7	00
Total.....	$537	37½

And it is for this amount that the plaintiffs move to have a verdict entered in their favour. They ask to have the verdict entered in their favour for the whole amount, either:

1. Because they have proved performance of all conditions precedent, or

2. Because the defendant has by his acceptance of the work precluded himself from saying that the contract has not been performed.

The contract is a peculiar one. The obligation of the defendant as to payments is as follows:—

1. That he will pay $2,000 in advance.

2. That he will pay 85 per cent. for the work actually done, after notice, but *no payment* shall be made without a written certificate of the architect.

3. That the balance of 15 per cent. is to remain in the hands of the defendant "as a security for the finishing of the said works, and likewise as a guarantee for the good quality," &c., and is to "remain unpaid for one calendar month next after the completion of the whole of the buildings, * * and also until all defects which the architect, * * shall within the same period *certify* to exist, &c., * * shall be completely remedied," &c.

The first question which arises on the reading of the contract is, whether the architect's certificate is a condition precedent to *all* payments under the contract, or only to the payments of 85 per cent. of the contract price.

The omission of the word "such" before the word "payment," in the portion of the contract which I have quoted, is an argument that all payments were intended to be covered by the certificate, whereas the situation of the provision in which the word occurs in the contract, is an argument that the provision was only intended to apply to the payments *previously* mentioned, *i. e.* the payments

of the 85 per cent., and not to the subsequent payment of the 15 per cent.

It is quite possible that the person who prepared the contract designed the provision, which is one intended for the security of the defendant, to apply to all payments, but the language used is certainly not free from doubt.

I follow the decision of Mr. Justice Morrison, sitting for the Court out of term. He, on the authority of *Pashby* v. *The Mayor, &c., of Birmingham,* 18 C. B. 2, 31, held that as to the 15 per cent. no architect's certificate was necessary, and for that reason held that so much of the third plea as set up the want of the certificate as an answer to the claim for the 15 per cent. was bad. His decision, under the Administration of Justice Acts, unless re-heard, is the decision of the Court. See 36 Vic., ch. 8, secs. 21, 22, and 23; and 37 Vic., ch. 7, secs. 17, 18, and 19.

It was not re-heard, so that, in accordance with the decision of the Court on the demurrer, I must hold that the architect's certificate as to the 15 per cent. is not a condition precedent to the action on the contract.

This being so, the plaintiffs contend, under the contract, that the building was completed on the 8th of November, 1873, and that as the architect did not, within one month thereafter, "certify" any defects to exist, the defendant is not any longer entitled to hold the 15 per cent., and the plaintiffs having done the work are entitled under the contract to be paid for it.

This contention is based on the supposition that a "certificate in *writing*" is required by the contract to be made by the architect within the month, although the contract merely uses the word "certify."

Here, again, it is to be observed that although the person who framed the contract may have intended "a certificate in writing," he has not so said. And there was evidence to shew that the architect within the month was not satisfied with what he claimed to be defects and signified his dissatisfaction.

It has been held in *Roberts* v. *Watkins*, 14 C. B. N. S. 592, under a building contract, that the word "certify" does not mean a certificate in writing, and I am not aware the decision has ever since been questioned.

I therefore follow it, and hold that if the contract was not performed the defendant is not precluded from shewing as an answer to the action, that within one month his architect did signify dissatisfaction with particular defects, although he did not signify his dissatisfaction in writing, as an answer to the action.

This renders unnecessary the consideration of the proposed equitable plea as to a substituted agreement, which the learned Judge found to exist, and so finding rendered his verdict for the defendant.

It is to be observed that no point was in the argument attempted to be made by the defendant in answer to the action that the work was not done on the 15th of August, 1873, as stipulated, and that the obligation of defendant is only to pay on condition of the work being proved to be so done.

It is certainly not clear that this provision is a condition precedent to payment. See *Lucas* v. *Godwin*, 3 Bing. N. C. 737, and *Tyrrell* v. *Gamble*, 12 U. C. R. 669. But if it be, it is also clear that on the facts proved, defendant having himself delayed the performance, and it appearing that but for such delay the work would have been done within the time an action for damages would lie against defendant, in which action recovery might be had for the work done although not done within the time limited by the contract. See *Roberts* v. *Bury Improvement Commissioners*, L. R. 4 C. P. 755, S. C. L. R. 5 C. P. 310; *McDonell* v. *Canada Southern R. W. Co.*, 33 U. C. R. 313.

I merely mention the point to shew that it has not escaped the observation of the Court, and is not in any manner made the ground of the decision.

It is as important as ever that the law of contracts should be enforced whenever invoked, although there is not now as much particularity about the pleadings as formerly.

Where a written certificate is by the contract made a condition precedent to payment, the Court must hold the parties to the contract, however harsh may be the consequence. If the written certificate of an architect be by the contract made a condition precedent to the right to payment there can be no recovery on the contract without the written certificate. See *Milner* v. *Field*, 5 Ex. 829; *Grafton* v. *The Eastern Counties R. W. Co.*, 8 Ex. 699; *Elliott* v. *Hewitt*, 11 U. C. R. 292; *Munro* v. *Butt*, 8 E. & B. 738; *Coatsworth* v. *The City of Toronto*, 10 C. P. 73.

It follows that there can, under no circumstances, be any recovery under the contract for the extras in this case; for the concluding part of the contract is to the effect that no extras of any kind shall be *permitted* or *allowed*, unless the same have been agreed upon in writing, and the price for such work duly ascertained and embodied in the writing, and that the writing shall be *produced* before payment. In this case no such writing for extras was either mentioned or produced, and therefore the claim for extras must also, so far as the contract is concerned, fail. See *Russell* v. *Viscount Sa da Bandeira*, 13 C. B. N. S. 149; *Wright et al.* v. *Corporation of the County of Grey*, 12 C. P. 479.

There is no difference between Courts of law and equity as to the construction or operation of such clauses. See *Kirk* v. *Guardian of the Poor of the Bromley Union*, 2 Phil. 640; *Scott* v. *The Corporation of Liverpool*, 3 DeG. & J. 334.

This conclusion entitles defendant to hold his verdict to the count on the contract.

The remaining matter for consideration is, whether on the facts proved the plaintiffs are entitled to recover the amount which they claim, or any amount whatever, under the common counts for work and labour, materials, &c.

In *Ellis* v. *Hamlen*, 3 Taunt. 52, which was an action by a builder against his employer upon a contract for building a house of materials and dimensions specified in the contract, when it was shewn that the plaintiff had omitted

to put into the building certain joists and other materials of the given description and measure, it was contended that the plaintiff having substantially done the work, and defendant having got the benefit of his work, was entitled to recover the contract price, less whatever it would take to put in joists, &c.

In answer, Mansfield, C. J., said, p. 53: "It is said he (defendant) has the benefit of the houses, and therefore the plaintiff is entitled to recover on a *quantum valebant.* To be sure it is hard that he should build houses and not be paid for them; but the difficulty is to know where to draw the line; for if a defendant is obliged to pay in a case where there is *one* deviation from his contract, he may be equally obliged to pay for anything, how far soever distant from what the contract stipulated for."

The plaintiff was accordingly nonsuited, and according to the words of the report, "the case was never again moved."

The rule would, of course, be different if it were shewn that the original contract was abandoned and the work proceeded with under a different contract, or in the absence of any particular contract: *Burn* v. *Miller,* 4 Taunt. 745; *Crossthwaite* v. *Gardner,* 18 Q. B. 640; *Tyrrell* v. *Gamble,* 12 U. C. R. 669.

So if the original contract were not under seal, and if it were shewn that the parties by parol agreed to waive one of its conditions, and that the work was done under the agreement with the condition waived. See *Alexander et al.* v. *Gardner,* 1 Bing. N. C. 671.

It is, if there be evidence, a question of fact whether the particular contract was abandoned and the work done under an altered or different contract. See *De Bernardy.* v. *Harding,* 8 Ex. 822.

But the mere fact that the defendant has taken possession of a building erected on his own land, is not enough to shew that the original contract was abandoned, or to raise an obligation to pay as on an implied *assumpsit* *Munro* v. *Butt,* 8 E. & B. 738.

Lord Campbell, in giving judgment in the last-mentioned case said, pp. 752, 753 : "Now, admitting that in the case of an independent chattel, a piece of furniture for example, to be made under a special contract, and some term, which in itself amounted to a condition precedent, being unperformed, if the party for whom it was made had yet accepted it, an action might, upon obvious grounds, be maintained, either on the special contract with a dispensation of the conditions alleged or on an implied contract to pay for it according to its value ; it does not seem to us that there are any grounds from which the same conclusion can possibly follow in respect of a building to be erected, or repairs done, or alterations made, to a building on a man's own land, from the mere fact of his taking possession. Indeed the term 'taking possession' is scarcely a correct one. The owner of the land is never *out* of possession while the work is being done. But, using the term in a popular sense, what is he, under the supposed circumstances to do ? The contractor leaves an unfinished or ill-constructed building on his land ; he cannot, without expensive, it may be tedious, litigation, compel him to complete it according to the terms of his contract ; what has been done may shew his inability to complete it properly ; the building may be very imperfect, or inconvenient, or the repairs very unsound ; yet it may be essential to the owner to occupy the residence, if it be only to pull down and replace all that has been done before. How then does mere possession raise any evidence of a waiver of the conditions precedent, of the special contract, or of the entering into a new one ? If, indeed, the defendant had done anything, coupled with the taking possession, which had prevented the performance of the special contract, as if he had forbidden the surveyor from entering to inspect the work, or if, the failure in the complete performance being very slight, the defendant had used any language, or done any act, from which acquiescence on his part might have been reasonably inferred, the case would have been very different. Here there was nothing of that kind ; the reliance of the plaintiff was simply on the

defendant's possession. We were pressed of course with the argument of hardship; it was said to be unjust that the defendant should enjoy the labour expended and materials furnished by the plaintiff. The argument of hardship in a particular case is always a dangerous one to listen to; but in truth there is neither hardship nor injustice in the rule with its qualification; it holds men to their contracts; it admits, from circumstances, the substitution of new contracts; nor is there any hardship in the present case disclosed by the evidence; and a verdict for the plaintiff might work a greater hardship on the defendant compatibly with that evidence."

If this decision be law and applicable to the case now before us, it disposes of it in favour of the defendant.

It has been approved and followed in *Hamilton* v. *Myles et al.*, 23 C. P. 293, and although the latter decision was reversed by the Court of Appeal in 24 C. P. 309, the reversal was rather on the ground that *Munro* v. *Butt* was inapplicable, than on the ground that it is not law.

I must say that *Munro* v. *Butt* is a decision which recommended itself to my reason ever since it first appeared in 8 E. & B., and one which I am prepared, whenever applicable, willingly to follow.

In this case it is, I think, strictly applicable. The land on which the work was done was the land of the defendant. He was never, therefore, out of possession. It is not shewn that defendant when, in popular language, he took possession, did anything to prevent the architect from entering to inspect the work, nor is it shewn either that the failure in performance is very slight, or that defendant when taking possession had used any language or done any act from which acquiescence might have been reasonably inferred. But, on the contrary, it appears that the architect did inspect: that the result of the inspection was dissatisfaction: that it would, in his opinion, cost $250 to make the plaintiffs' work satisfactory: that it has not yet been made satisfactory; and that defendant has, ever since the alleged completion, urged that it is unsatisfactory.

I cannot, therefore, hold that the plaintiffs are in this action entitled to recover the contract or any other price under the common counts.

If it could be held that the plaintiffs are entitled to recover as on a *quantum meruit*, it would be open to defendant to reduce the claim by $250, or whatever sum is necessary to make the work answer the requirements of the contract. See *Basten* v. *Butler*, 7 East 479; *Farnsworth* v. *Garrard*, 1 Camp. 38; *Chapel* v. *Hicks*, 2 C. & M. 214. The architect, called for the defendant, swore that it would take $250. Mr. Robinson, the counsel for the defendant, had other evidence on the same point. The learned Judge, in order, if possible, to end the litigation, suggested that he should be allowed to render a "compromise verdict" by deducting $200. This commendable suggestion on the part of the learned Judge was not assented to. The parties apparently preferred to have the case decided according to their strict legal rights.

In my opinion, the plaintiffs have no legal right in this action, either under the special counts or the common counts, to recover anything. I agree, both as to the law and the facts, with the finding of the learned Judge who tried the case.

I think the rule must be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

Crozier v. Tabb et al.

Lease—Construction—Act respecting short forms—Covenant to take care of trees.

A lease, purporting to be made in pursuance of the act respecting Short Forms of Leases, contained this proviso: "Proviso for re-entry *by the said lessor*, on non-payment of rent, *whether lawfully demanded or not*, or *on* non-performance of covenants, *or seizure or forfeiture of the said term for any of the causes aforesaid*," the words in italics not being in the short form given by the statute. *Held*, that the addition of these words did not exclude the application of the statute; and that the proviso extended to covenants after as well as before it in the lease.

The lessees covenanted "to take proper care of the fruit trees." There were fruit trees then on the demised premises. *Held*, that the covenant did not extend to additional fruit trees planted afterwards *by the lessor*, with the assent of the lessees.

Ejectment for the south half of lot 19, in the 8th concession of Cartwright.

The plaintiff claimed title under a lease dated 24th of December, 1870, and made between the plaintiff of the one part, and the defendants of the other part, alleging that the lease had become forfeited by non-fulfilment of covenants contained therein.

The defendants claimed title under the same lease, and denied the forfeiture.

The case was tried at the Spring Assizes, 1875, at Cobourg, before Richards, C. J., and a jury.

The lease was dated 24th December, 1870. It purported to be made "in pursuance of the Act respecting short forms of leases," Consol. Stat U. C. ch. 92. It was from the plaintiff to the defendants, and was of the land in dispute. *Habendum* for six years to be computed from 1st March, 1871; *Reddendum* $238 per annum on 1st of October in each year. Then followed the usual covenants on the part of the lessees, such as to pay rent, to pay taxes, and to repair. Next followed this proviso: "Proviso for re-entry by the said lessor on non-payment of rent, whether lawfully demanded or not, or on non-performance of covenants, or seizure or forfeiture of the said term for any of the causes aforesaid."

Next followed this covenant: "The said lessor covenants with the lessee for quiet enjoyment; and the said lessees covenant with the said lessor not to sell or dispose of any straw or manure; to take proper care of the fruit trees," &c., and other covenants on the part of the lessees not necessary to be mentioned.

There were fruit trees on the demised premises at the time the lease was made. Subsequently the lessor with the assent of the lessees planted additional fruit trees.

The jury found that the defendants took proper care of the fruit trees planted before and at the time the lease was made, but not of those planted subsequently.

The learned Chief Justice on this finding directed a verdict for the plaintiff subject to the opinion of the Court whether on the facts found the plaintiff was entitled to recover.

The case was argued during this term, February 21st, 1876, by *Beaty*, Q.C., for plaintiff. The proviso here applies to all the covenants contained in the lease, whether before or after the proviso: *Doe d. Spencer* v. *Godwin*, 4 M. & S. 265; *McNaughton* v. *Wigg*, 35 U. C. R. 111; *Minshull* v. *Oakes*, 2 H. &. N. 793; and trees planted after the lease are, like buildings put up after a lease, subject to the operation of a general covenant to keep in good repair: *Dowse* v. *Cale*, 2 Ventr. 126; *Brown* v. *Blunden*, Skinner 121; *Clifford* v. *Watts*, L. R. 5 C. P. 577; *Broom's* Legal Maxims, 3rd ed., 515; *Woodfall's* L. & T., 10th ed., 486.

Loscombe, contra. The proviso to the lease is not under the statute. It ought not to be read as applying to a covenant subsequent thereto, and if so read the covenant in question does not cover after-planted fruit trees. He cited *Doe d. Willson* v. *Phillips*, 2 Bing. 13; *Cole* on Ejectment, 403.

March 17, 1876. HARRISON, C. J.—It is argued by counsel for the defendants :—

1. That the lease is not under the statute because of the additional words used in the form of proviso.

2. That whether under the statute or not, the proviso should not be read as applying to a covenant subsequent thereto.

3. That the fruit trees planted after the lease was made are not covered by the covenant.

The Act Consol. Stat. U. C., ch. 92, is intituled "An Act respecting short forms of leases."

It enacts that when a deed made according to the forms set forth in the first schedule to the Act, "or any other deed expressed to be made in pursuance of this Act or referring thereto," contains "any of the forms of words contained in column one of the second schedule hereto anexed," and distinguished by any numbers therein, "such deed shall be taken to have the same effect and be construed as if it contained the form of words contained in column two of the same schedule, and distinguished by the same number as is annexed to the form of words used in the deed," but "it shall not be necessary in any such deed to insert any such number."

The lease here is expressed to be "in pursuance of the Act respecting short forms of leases," and so far complies with the statute. Then has it the form of words contained in column one? It contains most of the forms of words given in that column, omitting the numbers.

But instead of the mere words in column one "proviso for re-entry on non-payment of rent or non-performance of covenants," it has the words "proviso for re-entry (*by the said lessor*) on non-payment of rent (*whether lawfully demanded or not*) or (*on*) non-performance of covenants (*or seizure or forfeiture of the said term for any of the causes aforesaid.*")

The words italicized and in brackets, it will be observed, are in amplification of the words used in column one of the statute. All the words in column one as to the proviso are, however, in the proviso here. The words of amplification which do appear do not materially alter the sense.

When this happens in the case of a deed on the face of it purporting to be made in pursuance of the statute and

having most of the covenants in the very words and order of the statute; the statute ought not to be held inapplicable.

If the words required in the proviso in column one were not in the lease we could not give to the proviso the effect intended in column two. But where we find each and all of the words, with something added, which, though increasing the number of words, does not actually alter the sense, it would be too strict a construction to hold the proviso of the statute inapplicable: *Davis* v. *Pitchers*, 24 C. P. 516; *McNaughton* v. *Wigg*, 35 U, C. R. 111.

Then reading the extended words of the proviso in column two we find them to be: "Provided always, and it is hereby expressly agreed, that * * in case of the breach of any of the covenants or agreements *herein* contained on the part of the lessee, his executors, administrators, or assigns, then and in either of such cases it shall be lawful for the lessor at any time hereafter into and upon the demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy as of his or their former estate, anything hereinafter contained to the contrary notwithstanding."

It is to be noticed that the proviso is not, either in the short or the extended form, curtailed in its operation like the proviso in *Doe d. Spencer* v. *Godwin et al*„ 4 M. & S. 265. It clearly applies to all covenants contained in the lease on the part of the lessees. The covenant "to take proper care of the fruit trees" in the lease before us is one such covenant.

But the question as to which I had the most doubt at the argument still remains, and that is as to the proper interpretation of this covenant.

Counsel for the plaintiff relied upon *Brown* v. *Blunden*, Skinner 121, and *Dowse* v. *Cale*, 2 Ventr. 126, as authorities to support his argument that the covenant applied to future fruit trees as well as trees then existing.

In *Brown* v. *Blunden* the covenant was to repair, &c. *prædimissa* from the time of the lease to the determination

thereof, and so well kept in repair to give up at the end of the term, not saying from time to time. Afterwards the lessee built a malt house, and the question was, whether the covenant should extend to it. It was, held that it should for "it was a continuing covenant, and though the house had no actual yet it had a potential being at the time of the lease."

In *Dowse* v. *Cale* the lessees agreed to build three houses, and the particular covenant was "well and sufficiently to repair all the houses so agreed to be built." There were also, as it was contended, other covenants to repair. The question was, whether the defendant being obliged to build three houses and having built "one more," whether the covenant did not bind him to repair and deliver up that house well repaired as well as those which were agreed to be built? And the Court were of opinion that the covenant did extend to the other house as well as to the three agreed to be built, and for this reason: "In the last covenant, which is to deliver up well repaired, 'tis *dicta permissa ac domos et ædificia superinde fore erecta*, which is general; and 'tis the rather so to be taken, for in the first covenant for keeping in repair during the term, 'tis the houses agreed to be built, which words (agreed to be built) are left out in the last covenant, which the Court took to be a distinct covenant."

Rokeby, J., however, doubted, "it seeming to him to be all as one covenant, and so all the subsequent matter concerning the leaving the houses well repaired should be restrained and understood of those agreed to be built."

In *Lord Darcy* v. *Askwith*, Hob. 234, it is said: "A lessee may build a new house where none was before, but that must be every way at his own charge: for he must neither take timber nor other things wastable, neither to build nor repair it, though it be never so needful. And yet if he keep it not in repair, an action of waste lies, though the writ be in *Domibus dismissis*, 42 Ed. III. 22; 17 Ed. II. 17, Ed. III. Fitz. Wast. 118, 101; and 11 H. IV. 34. But if the *lessor* build a house after the lease, the lessee is not bound to keep it in repair: 49 Ed. III. 1."

These cases, if undoubted law and applicable to fruit trees, would shew that where the lessee, under a general form of covenant to take good care of fruit trees, himself plants trees, the covenant would apply to such trees, but not as here to trees planted by the lessor.

The authority of these cases, even for the propositions which they are supposed to establish, is shaken by *Cornish et al.* v. *Cleife et al.*, 3 H. & C. 446. It was an action of ejectment, like the present, to recover possession on the alleged ground of forfeiture. The covenant was "well and sufficiently to repair, sustain, and keep the said tenements or dwelling-houses, field, or plot of ground, and every part thereof, as well in houses, buildings, walls, hedges, ditches, fences, and gates, when and as often as occasion shall require during the said term, and at the end or other sooner determination thereof the said premises, so well and sufficiently repaired, into the hands and possession of the lessors, peaceably to leave and yield up." There was, besides, the usual proviso for re-entry. It was contended that the covenant did not extend to buildings erected after the lease was granted. And this was the question. Counsel for the plaintiff pressed the Court with the authority of *Douse* v. *Cale* and *Brown* v. *Blunden*, but the Court notwithstanding held it did not extend to the newly erected houses.

Neither Pollock, C. B., nor Piggott, B., assign any reasons for the conclusion at which they arrived.

The reasoning of Bramwell, B., is opposed to the reasoning in *Douse* v. *Cale* and *Brown* v. *Blunden*; but strange to say, not one of the Judges refers to these cases by name.

Channel, B., in delivering judgment, said, p. 451: "I agree in thinking it necessary in every case to attend to the particular language of the covenant. It can scarcely be expected that cases will be found so directly in point as to relieve the Court from the necessity of considering the effect of the language used. The authorities cited in the text books establish these rules, that where there is a

general covenant to repair, and to keep and leave in repair, the inference is, that the lessee undertakes to repair newly erected buildings. On the other hand, where the covenant is to repair, and keep and leave in repair *the demised buildings*, no such liability arises. This case does not fall exactly within either rule, but it appears to me to fall more within the latter."

This decision agrees with the ruling of Coleridge J. in *Doe d. Worcester School Trustees* v. *Rowlands*, 9 C. & P. 734, and is said in *Roscoe's*, N. P., 13 ed., 697, to be clearly inconsistent with the decision in *Brown* v. *Blunden*, and the opinions of the Judges expressed in *Lord Darcy* v. *Askwith*, Hob. 234, and *Douse* v. *Earle*, 3 Lev. 264, S. C., sub. nom., *Douse* v. *Cale*, 2 Ventr. 126, cited in *Bac.* Ab. "Covenants."

The covenant here is, "to take proper care of *the* fruit trees." There were fruit trees on the demised premises at the time. This, in the absence of some intention to plant additional fruit trees being at the time contemplated, could only mean "*the* trees" *then* standing and being—in other words, *the demised fruit trees*. It is not shewn in evidence that at the time of the execution of the lease it was contemplated by the lessor and lessees or any of them to plant additional fruit trees. But even if it were shewn, I am not prepared to say that I ought to read the covenant as applying to any beyond the fruit trees then in being.

Besides the reason, if any, for holding that a lessee is not, under a general covenant to repair, bound to repair buildings afterwards put up by the *lessor*, applies in the case of fruit trees afterwards planted by the *lessor*. The lessee, seeing the trees then in being and knowing their situation, might be quite content to undertake to take proper care of *them* while unwilling to take similar care thereafter of *any* fruit trees which the lessor might see fit to plant in *any* part of the demised premises.

Moreover forfeitures are not to be favoured. If landlords intend to re-enter for non-performance of such a duty as here set up, the least we can require of them is to make

the duty reasonably plain and free from doubt. The defendants are in possession. The landlord is seeking to turn them out of possession by what I take to be a strained construction of the covenant, and one which it will not fairly bear.

Even if I could do no more than doubt the correctness of the interpretation sought to be placed on the covenant by the landlord, it would in such a case be my duty not to disturb the possession.

The only doubt which I entertained arose from the citing of the cases in Skinner and Ventris. This caused me to defer the expression of my opinion till I should have an opportunity of deliberately examining these cases. Having had that opportunity I have only now to say that my first impression as to the proper interpretation is not at all weakened.

I do not think that the covenant can be fairly read as applying to fruit trees thereafter to be planted by the lessor. There is really nothing in the writing to indicate that as the intention of the parties. Nor was there at the time anything outside of the writing to indicate such an intention.

The planting of trees afterwards was in every sense an afterthought. It was not in the contemplation of any of the parties at the time the lease was executed. It is not therefore surprising that the lease makes no reference to the happening of such an event, and in no manner provides for it.

I think the verdict must be entered for the defendants.

MORRISON, J., and WILSON, J., concurred.

Rule accordingly (a).

(a) See *Crozier* v. *Tabb et al.*, 26 C. P.

Spooner et al. v. The Western Assurance Company.

Marine insurance—Deck load—General average.

Defendants insured the plaintiffs' vessel by a policy containing nothing as to deck loads. A hold full and deck load of coal was shipped upon her at Cleveland for Toronto, by a bill of lading, which provided "all property on deck at risk of owners." She went ashore during the voyage, and the coal upon deck was thrown overboard in order to get her off and save the vessel and the rest of the cargo, which was thereby accomplished. It was admitted that the usage at the date of the policy, as well as at the time of the loss, was for vessels trading between Toronto and Cleveland to carry deck loads.

Held, looking at the special terms of the bill of lading, that the defendants were not liable to contribute to their share of the loss.

Semble, however, that but for the bill of lading the defendants would be liable, for that the usage to carry deck loads being admitted, the jettison of such load, in the absence of any usage to the contrary, must be contributed for in general average.

Special case stated by consent of parties and order of R. G. Dalton, Esq., C. C. & P., in Chambers, as follows:

This action is brought for the recovery of $254.47, for contribution by the defendants to the general average loss of the plaintiffs and others set out below.

The plaintiffs are the owners of a vessel called the "Canadian." The "Canadian" was insured for 1873, by a policy of the defendants against the adventures and perils of lakes, rivers, canals, fires, and jettisons, that should come to the damage of the said vessel, or any part thereof, which said policy contained certain exceptions, none of which related to the carrying of deck loads. On the 19th of September, 1873, the captain, acting as agent for the plaintiffs, agreed with a coal company in Cleveland to carry a cargo of coal from Cleveland to Toronto, and signed a bill of lading in the words and figures following:

"Cleveland, Ohio, September 19th, 1873.

"Shipped by Card & Babcock, in good order and condition on board of the schooner 'Canadian,' and consigned, as per margin, to be delivered in like order and condition, (the dangers of fire, collision, and navigation only excepted,) as addressed in the margin, subject to all freight and charges as below. All property on deck at the risk of vessel and owners.

"Wm. Myles & Son, Toronto, Ont. 300 tons C. & W., Coal Lake, $2.35, gold.

"W. Hetherington."

The cargo consisted of a hold full and deck load. The vessel left Cleveland laden in this way, and when off Long Point went ashore. The tug "Niagara," was employed by the captain to pull off the "Canadian," but this it was unable to do until the deck load had been thrown overboard. The deck load was thrown overboard, and by reason thereof the vessel was safely got off. It was the usage at the date of the policy, as well as at the time of the said loss, for vessels trading between Toronto and Cleveland to carry deck loads. The jettison of the deck load was made to save the vessel and the remainder of the cargo. A statement of general average was made by which the freight, cargo, and hull, are made to contribute to the loss of the deck load thrown overboard as aforesaid. The plaintiffs claim that the defendants are liable to contribute their share of said loss.

The defendants deny the said liability.

The question for the opinion of the Court is, whether, under the circumstances of the case hereinbefore stated, the defendants are liable to contribute their share of said loss.

If the Court shall be of opinion in the affirmative, their judgment shall be entered up for the plaintiffs for $254.47, and costs of suit. If the Court shall be of opinion in the negative, their judgment with costs of defence shall be entered up for the defendants.

The case was argued January 21, 1876, before Morrison, J., sitting alone, by *McMichael*, Q.C., for the plaintiff, and by *Bethune*, for defendants. The argument was in substance the same as that on the re-hearing, *post*, p. 85.

February 11th, 1876, MORRISON, J.—I am inclined to think that upon the special case before me the defendants are not liable to contribute to the plaintiffs, the owners of the vessel, the amount claimed as general average on account of the jettison of the deck load, the deck load being carried at the plaintiffs' own risk as shewn by the bill of lading.

I cannot say that the existence of a usage to carry deck loads includes with it a rule that such deck load, when jettisoned, is entitled to participate in general average.

After considering the authorities and text writers referred to, I have come to the conclusion that, as a general rule, a deck load is not a subject of general average, and that the exceptions to this rule arise where there is some contract or understood usage or custom, applicable to particular vessels or voyages, providing that a deck load when jettisoned shall be the subject of general average. Again, this is not a case where the owner of the deck load claims to be entitled as against a co-shipper of goods, but it is a claim for contribution by the owner of the vessel, who shipped the deck load at his own risk, against the underwriters of the vessel upon a policy silent as to deck loads.

No case exactly in point was cited in support of the plaintiffs' contention; and the general average being as I have stated, and the special case only stating a usage to carry a deck load, without any statement of a further usage in such a case that the deck load when jettisoned contemplates a general average, on the whole, my present opinion is, although not free from doubt, that the defendants are entitled to my judgment. I may also remark that it does not appear the defendants had any notice of the deck load. I find a decision that may have some bearing upon this case—*Clarkson* v. *Young*, 22 L. T. N. S., 41—where Lush, J., held that the underwriters were not liable for the loss of a deck load jettisoned, where they had not notice of it.

From this judgment the plaintiff appealed, and the case was re-heard before the full Court, February 21st and 25th, 1876.

McMichael, Q. C., for the plaintiffs. The law seems, from all the authorities, to make the company liable here: 1 *Phillips* on Insurance, 5th ed., 577; 2 *Phillips* on Insurance, p. 66, sec. 1282; *Hopkins* on Marine Insurance, 116, 117; *Milward* v. *Hibbert*, 3 Q. B. 120; *DaCosta* v.

Edmunds, 4 Camp. 123; 1 *Park* on Insurance, 8th ed., 24; *Merritt* v. *Ives*, M. T. 4 Vic. R. & H, Dig., p. 111; *Miller* v. *Tetherington*, 6 H. & N. 278; *Hurley* v. *Milward*, Jones & Carey 234. [MORRISON, J., referred to *Lenox* v. *United Insurance Co.*, 3 Johns C. cases 178 By the custom on the lakes the plaintiffs' deck load is properly included in the policy.

Bethune, contra. The words in the bill of lading "All property on deck at the risk of owners," limit the liability under the policy and relieve the company. But if that were not so the cases when examined will be found to support the defendants' contention. He referred to *Dixon* on General Average 34; *Clarkson* v. *Young*, 22 L. T. N. S. 41; *Grouselle* v. *Ferrie*, 6 O. S. 454; *Gibb* v. *McDonell*, 7 U. C. R. 356; *Gould* v. *Oliver*, 4 Bing. N. C. 134; *Stevens* on Average, 2nd ed., 14; *Hopkins* on General Average, 3rd ed., 18; *The Milwaukee Belle*, 21 L. T. N. S. 800.

March 17, 1876. HARRISON, C. J.—The insurance is upon a schooner called the "Canadian." The adventures and perils insured against are, according to the policy, those of "the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel, or any part thereof," with certain exceptions unnecessary to be mentioned.

Among other express stipulations contained in the policy are the following: "No partial loss or particular average shall in any case be paid by the insurer, unless the amount of the whole of such damage or loss (after deducting one third new for old) equals or exceeds five per cent of the valuation aforesaid."

"Each passage from port to port, shall be subject to its own separate average."

"The insured shall not have the right to abandon the vessel in any case unless the amount which the insurers would be liable to pay under any adjustment as of a particular loss, exclusive of general average and charges of the nature of general average, shall exceed half of the amount of the valuation aforesaid."

Although the policy contains no express promise to contribute to a general average, it was conceded by counsel for the defendants, that under such a policy, as far as a general average is occasioned by perils insured against, the insurers are liable for it to the amount insured.

It would seem that an insurer contracts to pay general average by a policy which exempts him from average in certain cases, "unless general," the legal effect of which appears to be equivalent to an express engagement to pay for general average. See *Great Indian Peninsular R. W. Co.* v. *Saunders*, 1 B. & S. 41; S. C. 2 B. & S. 266; *Booth* v. *Gair*, 15 C. B. N. S. 291; *Kidston et al.* v. *The Empire Marine Ins. Co., Limited*, L. R. 1 C. P. 535.

But the question in controversy here is, whether conceding a liability of the underwriters to contribute to a general average in a proper case, there is any liability on the facts stated in this case.

The cargo jettisoned was a deck cargo. The vessel at the time was *en route* from Cleveland to Toronto. The case shews that it was the usage at the date of the policy, as well as at the time of the loss, for vessels trading between Toronto and Cleveland to carry deck loads.

The case does not state that the underwriters had express notice of this usage or in any manner referred to it in their contract of insurance.

The case does not state whether the shipment on deck was with the consent of the owner of the cargo, otherwise than may be inferred from the stipulation: "All property on deck at the risk of the vessel and owners."

The cargo jettisoned was coal. There was besides a cargo under deck. The vessel left Cleveland loaded in this manner, and when off Long Point went ashore.

It became necessary for the safety of the vessel, to throw the deck cargo overboard. This was done. The consequence was as anticipated, that the vessel floated and was saved. The jettison of the cargo was voluntarily made to save the vessel and cargo under deck.

The question in controversy must be decided by the

principles of the maritime law. The maritime law, as said by Lord Mansfield, is not the law of any particular country.

The general rule is, that goods necessarily thrown overboard for the preservation of the ship and cargo, shall be entitled to a general average contribution.

An apparent exception to the rule is, that goods laden on deck shall not receive contribution.

The reason apparently is, that in sea-going vessels the deck is considered an improper place for cargo, and that cargo when placed there it generally impedes the navigation and increases the risk. See 36 Vic. ch. 56, D.

But the law of England has stopped very far short of the doctrine that under no circumstances shall the owner of a deck cargo be entitled to a general average contribution: per Lord Denman in *Milward* v. *Hibbert*, 3 Q. B. 137.

The proposition that the owners of a deck cargo are not entitled to general average contribution, is a proposition laid down with respect to mere sailing vessels, and laid down at a time when steam, as a motive power on sailing vessels, was unknown. The reason of it is, that goods stowed on deck obstruct the mariners in the navigation of the vessel. In a vessel plying from port to port, that reason does not apply. These vessels are fitted up for a peculiar description of trade, and carry a large portion of their cargoes on deck. Per Pennefather, J., in *Hurley* v. *Milward*, Jones & Carey, 224.

The exception as to deck cargoes was first established when all vessels were propelled by sails, and when there was no machinery in the hold of the ship. But the introduction of steam into the marine service has wrought great changes in the situation of the motive power, and has rendered the steamboat deck in some navigations the safer place for the stowage of cargo: *Harris* v. *Moody*, 4 Bosw. 210.

The *mere* fact of stowing deck cargoes on deck will not relieve the underwriter from responsibility inasmuch as they may be placed there "according to the usage of

trade," and so not impede the navigation or in any way increase the risk, per Lord Denman, in *Milward* v. *Hibbert*, 3 Q. B. 137.

In such a case as last supposed, it would, in the absence of authority, appear no more than reasonable that the owner of the deck cargo should, in the event of it being jettisoned for the common benefit, be entitled to general average contribution.

This was the ruling of Lord Ellenborough in *Da Costa* v. *Edmunds*, 4 Camp. 143, which was an action against an underwriter. Lord Ellenborough, at the trial, ruled that, "if there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it without any communication, and * * that the underwriters were not liable if the goods were carried on deck without such usage."

The ruling of Lord Ellenborough was afterwards affirmed by the full Court, who refused a a rule nisi for a new trial; *Dacosta* v. *Edmunds*, 2 Chit. R. 227.

In *Gould* v. *Oliver et al.* 4 Bing. N. C. 134, where the action was brought by the owner of the cargo against the owner of the ship, and a custom to carry deck loads in the particular trade was shewn, the owner of the ship was held liable to contribute to the owner of the cargo for a jettison of the deck cargo.

This, it is to be observed, was not a case of general average, but only of contribution as between the shipper and ship-owner, and as between them establishes a rule which has been fully approved in subsequent cases.

The case was a second time before the Courts, when it was attempted to shew that in the particular trade (timber from Quebec), it is customary for deck loads to be at the risk of the ship-owner; but, inasmuch as it was shewn that the shipper had not consented to the carrying of the cargo on deck, and that it had been improperly stowed on deck, the owner of the ship was, independently of any question of average, held liable for the entire value of the timber jettisoned: *Gould* v. *Oliver*, 2 M. & G. 208.

In the disposal of the case, it appeared to be conceded that a custom to carry a deck load may be modified by a custom not to pay for it as general average, if jettisoned; and this was afterwards expressly held to be law, in *Miller et al.* v. *Tetherington*, 6 H. & N. 278, S. C. 7 H. & N. 954.

In *Grouselle* v. *Ferrie et al.*, in this Court, 6 O. S. 454, which was an action by the shipper against the ship-owner, the cargo carried on deck was wine. It was proved to have been taken on deck with the consent of plaintiff's agent. It was also proved that the custom is, to carry deck loads on schooners navigating the lakes. *Gould* v. *Oliver* was followed, and the plaintiff, as the owner of the cargo, was held entitled to recover against the ship-owner.

Sir John B. Robinson spoke of the usage to carry deck loads on our lakes as "notorious and universal," and also said, "the nature of the navigation on our inland waters makes the usage a reasonable one;" but he doubted if the recovery could, in such a case, be had as for a general average.

He said, on this point, p. 445: "But the defendants object further, that the average has not been properly proportioned; and that the owners of the rest of the cargo should contribute, and so reduce the charge on the defendants; but this assumes that the owners of the cargo stored *below* are liable to contribute for deck cargo thrown over under these circumstances, which I take to be at least very questionable; and I take it to be a general principle, that *such cargo* is not liable, though the ship may be, because the load is taken on the deck with the assent and for the advantage of the owners." But a decision on the point became unnecessary, as the Court held that in the *first instance* the ship-owners are liable to the owners of the cargo thrown over, for whole loss, deducting the share of the loss which the owners of the cargo must themselves bear, and restricting the amount to be recovered, of course, to the value of the ship.

The very point was, however, afterwards raised for adjudication in *Gibb* v. *McDonell*, 7 U. C. R. 356. In

that case the owners of goods stored under deck paid, under protest, the shipowner contribution for a deck cargo jettisoned, and afterwards, while admitting the custom in lake navigation to carry deck loads, sued the shipowner for the money on the ground that there was no general average contribution as to deck loads in such a case.

Sir John B. Robinson, after referring to *DeCosta* v. *Edmunds*, 4 Camp. 143; *Gould* v. *Oliver*, 4 Bing. N. C. 134; and *Milward* v. *Hibbert*, 3 Q. B. 120, expressed the opinion that there was no right to general average. But before expressing that opinion the learned Chief Justice held that the owners of the ship had not made any voluntary sacrifice for the preservation of the cargo. So that the latter was the point decided in the case. The former was therefore an *obiter* opinion, but even though *obiter* the opinion of one so eminent is entitled to great respect in this Court.

This also appears to be the opinion of a recent writer on the law of general average (*Lowndes*). In speaking of *Gould* v. *Oliver*, he says: "The second decision in *Gould* v. *Oliver* led to the establishment of a practice, relative to timber deck loads, different from that which had hitherto prevailed. Whenever, as generally was the case, a provision for the carrying of a deck load is inserted in the charter party, the jettison of such deck load is replaced by a *contribution between the shipowner and the owner of the deck load.* The contribution is adjusted precisely in the same manner as a general average would be, but is called by a different name. It is called 'a general contribution.' Payment of 'general contribution' is enforced from no one who has not by express contract made himself a party to the stowage on deck. If there are on board the ship goods belonging to some third party, such party is not held liable to pay any share in the contribution. No underwriter is asked to replace what his assured has contributed, 'unless there be a clause in the policy assenting to the deck shipment,' or engaging to contribute towards such jettison.' The principle of these adjustments is, that as between

assenting parties to such stowage, the deck must be taken as the proper place for carrying cargo, and what is thrown from thence is to be treated as if it had been below the deck; but, as regards all parties who have not assented, the old rule remains in force, and for them there is no general average for deck load jettison": *Lowndes* on General Average, 2nd ed., p. 43.

The writer proceeds to point out that this practice is noticed with approval by the late Mr. Justice Willes, in *Johnson* v. *Chapman,* 19 C. B. N. S. 583. His language is quoted as follows: "This is an action by the shipper of cargo against the shipowner; and the charter-party contemplates a deck cargo. It is not suggested that there is any statute to make a deck cargo illegal; therefore it seems something more than custom to have deck cargoes. I think, it was from Quebec; but it is unnecessary to refer to any custom affecting the voyage, because according to the contract between the parties, there was to be a deck cargo. Then, immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo lawfully there by the contract of the parties, *it becomes subject to the rule of general average.*"

Mr. *Lowndes* points out that the observations italicised must evidently be understood with reference to the question before the Court, which was as to the right of the owner of the deck load to claim contribution *from the owners of the ship,* and not as to the question of general average contribution properly understood.

If the words be taken in their ordinary sense, the expression of opinion would be in favour of the plaintiff in this case; but if taken in the restricted sense suggested by Mr. *Lowndes* the opinion is against the plaintiffs.

It appears to me that there is some error in reporting the language of the learned and accurate Judge who delivered the judgment, and that if the words be read as used actually by him, they must be read in the restricted

sense suggested, i. e.: as "contribution as between the parties," (shipper and ship-owner), and not as general average contribution between all parties, (including persons having cargo under deck).

The words on the face of the shipping bill in this case, "all property on deck at the risk of the vessel and the owner," appear to me to point to the same restricted liability.

Where it is the usage of the trade to carry a deck load in inland navigation, and such usage is known to the shipper, and the bill of lading excepts the dangers of navigation, the shipper cannot, in the absence of express contract, hold the ship-owner responsible for a part of the deck load swept off in a storm, the bill of lading excepting the dangers of navigation: *Stephens et al.* v. *McDonell*, M. T. 6 Vic., R. & H. Dig. "Carrier," 10.

In the absence of express contract, the liability must depend on the usage in respect to deck loading in the particular navigation: *Paterson* v. *Black*, 5 U. C. R. 481. If the bill of lading had stated "deck load at the risk of the owners," it would have been held to mean at the risk of the owners of the goods and not the owners of the vessel: *Merritt* v. *Ives* M. T. 4 Vic., R. & H. Dig. "Carrier," 4. The phrase used in the bill of lading here, "at the risk of vessel and owners," can only mean at the joint risk of the owners of the vessel and of the goods.

Were it not for the special provision of the bill of lading that the deck cargo is to be "at the risk of the vessel and owners," I would have much difficulty in holding, even without a direct reference in the *policy* to deck loads, that underwriters are not bound, by an admitted usage to carry deck cargoes on our lakes.

Hopkins, in his Hand-book of Average, 2nd ed., says, "I have however, long entertained doubts whether underwriters have any valid grounds for resisting jettison of deck-cargo, even without a special clause. The custom is so general in some trades that it cannot be ignored, or held to be an innovation."—p. 20.

In these doubts I participate. I cannot understand why underwriters should not be fixed with knowledge of a usage to carry deck cargoes on our inland lakes. The usage was admitted in *Grouselle* v. *Ferrie et al.*, 6 O. S. 454, andin *Gibb* v. *McDonell*, 7 U. C. R. 356. It is admitted on the face of the case now before us. It is, in fact, so much a matter of notoriety that there cannot be much difficulty in any case of inland navigation in proving it, if denied.

It is true that the two cases last mentioned were not actions against underwriters; but what presses me is to find a reason for freeing underwriters from the knowledge of a usage that all engaged in the trade of navigation are bound to know.

In *Pelly* v. *Governor and Company of the Royal Exchange Assurance*, 1 Burr. 341, 348, it is said by Lord Mansfield: "The insurer in estimating the price at which he is willing to indemnify the trader against all risques, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen and in contemplation at the time he engaged. He took the risk upon the supposition that what was usual or necessary, would be done."

In *Noble et al.* v. *Kennoway*, 2 Doug. 510, 512, the same distinguished Judge said, "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year."

So in *Macy* v. *Whaling Ins. Co.*, 9 Metc. 354, it was in the United States held that an insurer is presumed to be acquainted with the practice of the trade in which he insures, although it has been but recently established. See also *Merchants and Manufacturers' Ins. Co.*, v. *Shillito*, 15 Ohio St. 559.

This is not new law; it is very old law. It is the law as laid down by Lord Ellenborough in *De Costa* v. *Edmunds*, 4 Camp. 142, upheld by the Court in the same case, in 2

Chit. R. 227, but somewhat obscured by more recent decisions.

In *Harris* v, *Scaramanga,* L. R. 7 C. P. 496, Mr. Justice Brett speaks of *Phillips* on Insurance, as "A book of the highest authority as to English as well as American Insurance law."

In 2 *Phillips* on Insurance, 5th ed., p. 70, (sec. 1282,) I find the following: "Taking into consideration the whole jurisprudence on the subject, the better doctrine, though opposed by some of the ajudications above cited, seems to be, that a jettison of a deck load is to be contributed for in general average where the stowing of the jettisoned article on deck is justifiable, and the other parties interested have notice by the policy, *or by usage, or otherwise,* that such articles may be so carried, and there is no plainly established usage negativing the right to claim such contribution."

The later decisions in the United States, are fully in accord with this view. See *Gillett* v. *Ellis,* 11 Ill. 579; *Toledo Fire and Marine Ins. Co.* v. *Spearss,* 16 Ind. 52; *Slater* v. *The Hayward Rubber Co.,* 26 Conn. 128; *Harris* v. *Moody,* 30 N. Y., 264; *In re Milwaukee Belle,* 2 Biss. 197.

Some of the earlier United States decisions are decidedly opposed to it. See *Smith* v. *Wright,* 1 Caines 43; *Lenox* v. *United States Ins. Co.,* 3 Johns. C. Cases, 178; *Dodge* v. *Bartol,* 5 Greenl. 286.

The oldest United States decision that I have seen, is in favour of it. I refer to *Brown* v. *Cornwell,* 1 Root 60. It was decided in the Supreme Court of Connecticut in 1793. The Court, in that case, held that where it is the custom to ship goods upon deck, when the stock upon deck is thrown over for the purpose of saving the cargo in the hold, "it is but reasonable that the cargo should bear a proportion of the price of its ransom."

If the matter were *res integra,* and I were unfettered by the terms of the bill of lading, I should, looking at the admission in the case that it was usual at the date of the policy

as well as at the time of the loss for vessels trading between Toronto and Cleveland to carry deck loads, and the absence of any statement that deck loads do not, according to the usage, give a claim to general average contribution, feel compelled to decide the general question against the underwriters.

But looking at the special terms of the bill of lading, that "All property on deck at the risk of the vessel and owners," looking at the contrariety of decisions bearing on the question, and consequent doubtful state of the law, I think it better to give the defendants the benefit of the doubt.

In doing so, I desire to hold myself as free as possible, should the general question hereafter arise with a different bill of lading.

It would be well for underwriters so to frame their policies as to shut out the question. This can be done either by expressly declaring that, in the case of inland navigation, deck cargoes shall have the right to general average contribution, or the reverse.

The matter is one entirely of contract, and should, in the present doubtful state of the law, be settled by the terms of the contract itself. Badly framed contracts leave much —carefully framed contracts little—and well framed contracts—nothing for litigation. It is the interest of all insurance companies and of all companies and persons making contracts, to shun the first—seek the second, and if possible attain the third, of these conditions.

MORRISON and WILSON, JJ., concurred.

Judgment for defendants.

Holliday v. The Ontario Farmers' Mutual Insurance Company.

Libel—Privileged communication—Evidence of malice.

The plaintiff had been the agent of defendants, an Insurance Company, and had obtained about 1600 policies for them. Having left them, he entered the service of another Company, and canvassed actively for that Company among defendants' customers, asking those whose policies were about to expire whether they wished to be insured or to insure again. Defendants gave evidence that he asked several of them to *renew* their policies, not telling them that he was acting for another Company, and that these persons believed that he was acting for defendants. Defendants' officers were respectively informed of all this, and that the plaintiff was representing himself as their agent. Under these circumstances defendants published in a newspaper an advertisement headed "Caution," and stating that, notwithstanding plaintiff's false statements to the contrary he was no longer their agent. The plaintiff sued for this alleged libel. There was no proof of malice in fact. It was objected that the communication was privileged, but the objection was over-ruled, and this question was left to be dealt with by the Court upon the evidence, upon the leave which was reserved to move for a nonsuit, neither side requiring any question to be left to the jury.

Held, that the occasion was privileged, and that neither the expression "false statements," nor the mode of publication, afforded sufficient evidence of malice. The verdict for the plaintiff was therefore set aside, and a nonsuit entered.

Semble, that the learned Judge at the trial might properly have ruled that there was a privilege, and no evidence of malice to go to the jury.

The pleadings are set out in 33 U. C. R. 558, when a new trial was granted.

The general effect of the evidence given upon the first trial is also set out in that report.

The cause was tried again at the Toronto Fall Assizes, before Burton, J., and a verdict was rendered for the plaintiff and $1,000 damages.

The only parts of the evidence it is material to notice are those which are now selected.

The plaintiff on his examination said: "I was the defendants' agent from January, 1868, to 3rd August, 1871; procured about 1600 risks during that time. * * The objection I have to the caution of 13th November is the words 'notwithstanding the false statements of Daniel Holliday to the contrary, he is no longer an agent of this company'; I never made a statement to any one that I was

agent after I resigned; I never said so, never acted so as to induce people to believe it; I would not consider it wrong if I asked them to renew when I knew their policies in the other company were about expiring. * * When I said to Mrs. Martin, I have come about the insurance, I referred to the insurance in the defendants' company. * * I visited a great number of persons who were insured with the defendants; only my own; there may have been a few others; I presume I acted in a similar manner as with Mrs. Martin. * * I did, in fact, induce a great many to withdraw from the old company and insure with the Isolated Risk Ins. Co., but I deny that I kept secret I was no longer an agent."

McMichael, Q. C., for defendants objected that it was a privileged statement; but the learned Judge thought that it was more widely circulated than was warranted, and that it was couched in language which deprived it of that character, and he over-ruled the objection, with leave to move, as he observed that one of the Judges seemed to have entertained that view.

For the defence, *Grace Martin* said: "The plaintiff called at my husband's house and enquired for him; I said he was in the field; I asked him (plaintiff) if he wanted to renew the insurance, he said, yes, it was about that insurance he called; I told him it was renewed; I think he said by whom; he said they were ahead of him, it was too bad; I told Mr. Bickell; I did not know at that time he was no longer agent. * * It was in the fall of 1872, in August or September; I told Mr. Bickell very soon after."

Charles Coakwell said: "Plaintiff called on me and asked if I wished to renew it; when plaintiff called again he said he thought my insurance was then about out; I said, Mr. Holliday, you are not the agent of that company (defendants' company); he said he knew that, and turned round and went away."

George Robertson said: "I told Bickell also of something of the like kind; I do not remember plaintiff saying he was doing business for the Whitby company."

John Graham said: "The plaintiff called on me and asked me if I was insured; I said I was not. * * I thought if I insured again I would insure through Weller (that would be in defendants' company;) he (plaintiff) said it was all the same; so I left the field and went with him to the house; I then insured; he made out the papers and I signed them, and then asked him to read them; I then discovered for the first time that there was such a company as the Isolated Risk; I said to him I'll withdraw; he said you have signed your name and you can't help yourself; I told him I wanted to be in the Whitby company. * * Wilson (acting for the defendants,) told me Holliday was going to advertise him in the papers; the reply I made was to tell him how he had insured me."

James B. Bickell, president of the defendants' company, said: "There was first an advertisement that plaintiff was not an agent; we had heard generally of his abusing the company, afterwards we heard that he still persisted in his statements, and this was brought up at each meeting, and the vice-president gave us individual cases of his interference with our customers. A short time after I met Mr. Martin and he referred to his own case; Mrs. Martin then said that Holliday complained of another agent having interfered, and got ahead of him; we published this notice in consequence to protect ourselves; * * * The information we then acted upon was, that an agent informed us that out of thirty applications he had only got two owing to plaintiff's representations; I am not certain if this was before the first or second advertisement; we got information of a similar purport before the first advertisement, but I cannot name any one from whom I received information; we did not send for plaintiff and ask him if it was true; I cannot say why we did not do so: * * I still believe in the fact he did misrepresent the company; I am not prepared to withdraw the charge; the company lost a great many policies owing to his misrepresentations; It would have been more expensive to have sent circulars; I do not know if it would have been more prudent; we thought our

business was suffering through these misrepresentations at the time we issued the second advertisement. It was solely in consequence of the interference with our policy holders that we published the advertisement." He also said: "I did call plaintiff a grey headed scoundrel under the provocation of his calling me a liar; he had plundered me by going through the bankrupt court."

There was evidence in reply. The plaintiff denied the truth of the statements made by the defendants' witnesses against him.

Thomas H. Willson, called in reply, said: "I charged plaintiff with deception. He said it was false. It was quite common, in fact there was a general impression throughout the county that he was practising a deception of that kind. I heard the rumour in various parts of the county. When I spoke to Mr. Bickell, I was under the impression that the general opinion was, that Holliday had been acting unfairly to the company. I heard of these rumours some two or three months more or less. I heard of them after I became agent. I gave the directors to understand that Holliday was pretending to act for the defendants' company.

McMichael, Q. C., renewed his objection as to this being a privileged communication, and the learned Judge overruled it. Verdict for plaintiff $1,000."

In Michaelmas Term, November 26, 1874, *McMichael*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved; or why a new trial should not be granted, on the ground that the verdict was contrary to law and evidence, that the communication was privileged, and that the plea of justification was proved; and for excessive damages.

In the same term, November 23, 1875, *Bethune* and *G. Y. Smith* shewed cause. This cause was before the Court some time ago. This is now the second verdict for the plaintiff. On the first trial the damages were $500; upon this trial they are $1,000. The case upon the evidence

could not have been withdrawn from the jury, and the Court will not interfere with the verdict unless it is given upon such evidence that it becomes a duty to set it aside. The jury expressly found against the privilege claimed by the defendants. The verdict is in no way against law and evidence. The charge is a serious one, and it has never been qualified or withdrawn. The plea of justification was found against by the jury. It cannot be said that the damages are too great when the defendants still persist in maintaining the charge.

They referred to *Williamson* v. *Freer*, L. R. 9 C. P. 393; *Tench* v. *Great Western R. W. Co.*, 33 U.C.R. 8; *Henwood* v. *Harrison*, L. R. 7 C. P. 606; *Laughton* v. *The Bishop of Sodor and Man*, L. R. 4 P. C. 495; *Spill* v. *Maule*, L. R. 4 Ex. 232; *Fryer* v. *Kinnersley*, 15 C. B. N. S. 422.

McMichael, Q. C., supported the rule. The Judge ruled the communication was not privileged, and he reserved leave to the defendants to move on that point. He did not leave the matter of privilege at all to the jury, and the defendants did not ask him to do so, nor did the plaintiff. The plea of justification was proved. The Judge thought the plaintiffs' own evidence sustained the plea and said so, and the verdict is therefore directly against the law and evidence: *Townshend*, on Slander and Libel, 393. The damages also are excessive.

February 4, 1816. WILSON, J.—We have spoken to the learned Judge who tried this cause, and he has informed us that according to the minute he made at the trial, he left the questions of privilege raised by the defendants' counsel and the objections taken to the same by the plaintiff's counsel, and his ruling upon them, to be dealt with by the Court upon the evidence upon the leave which he reserved to the defendants to move for a nonsuit: that neither party desired it to be left to the jury to say whether there was such excess in the language of the article as to deprive it of the protection of privilege, nor whether the mode of publication adopted by the defendants, of having it printed in

one or two of the local newspapers, would remove the privilege, nor whether these two matters combined would have that effect, and the jury did not therefore pass any opinion upon these subjects.

What should and what should not be left to the jury in such a case is not quite clear. I presume the general rule must apply in this as in every other case, that it is for the Judge to decide whether the evidence offered is admissible or not, and if received whether it is of such a character that it should be submitted to the jury. But where there is evidence received and it is proper to be left to them they alone decide upon its weight and effect.

It is said in *Taylor* on Evidence, 6th ed., sec. 33, "When a question arises as to whether a *communication* was *privileged* or not, * * the respective duties of the Judge and jury seem to be as follows: First, the jury must determine as a question of fact whether the communication was made *bonâ fide* and then,—if the fact be found in the affirmative, as it must be if the evidence be not sufficient to raise a probability that the communication was colourably made,—the Judge must decide, as a question of law, whether the occasion of the publication was such as to rebut the inference of malice. If, however, any doubt should exist as to whether or not the defendant had in some respect exceeded the limits of his privilege, and had made comments which might be regarded as evidence of *actual* malice, the opinion of the jury must be taken upon the effect of such evidence."

It is the last proposition of the section which is not, in my opinion, so plainly settled as it is stated.

The case of *Somerville* v. *Hawkins*, 10 C. B. 583, it is important to refer to, as settling the effect which a communication deemed to be privileged has, and what else the plaintiff must do to repel the privilege, or to rehabilitate his case. In that case the plaintiff had been a servant of the defendant, and had been dismissed on suspicion of having stolen some articles. On going for his wages the defendant called two of the other servants into the room

where he and the plaintiff were, and speaking of the plaintiff he said to them "I have dismissed that man for robbing me; do not speak to him any more in public or in private, or I shall think you as bad as him."

It was contended by the plaintiff's counsel that the act complained of was gratuitous, not like a communication made to a confidential person, or a matter that the other servants had any interest in, and that it was a question for the jury whether the statement was made under circumstances which indicated malice.

Wilde, C. J., was of opinion that it was a privileged communication, and that there was no evidence of malice, and that the defendant was entitled to a verdict on the first issue. A nonsuit was then entered.

Maule, J., in giving the judgment of the Court, said, p. 590: "We think * * the communication in question was privileged, that is, it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to shew affirmatively that the words were spoken maliciously; for the question, being one the affirmative of which lies on the plaintiff, must, in the absence of evidence, be determined in favour of the defendant. On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are consistent with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury, so that, to say, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it is not disproved,—which would be inconsistent with the admitted rule, that, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given. It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evi-

dence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than its non-existence."

I may be excused for giving this long extract because it expresses the rule so well, and its language has been adopted in every subsequent case as declaring the law upon this subject: *Taylor* v. *Hawkins,* 16 Q. B. 308; *Cooke* v. *Wildes,* 5 E. & B. 328; *Laughton* v. *The Bishop of Sodor and Man,* L. R. 4 P. C. 495; *Henwood* v. *Harrison,* L. R. 7 C. P. 606.

In *Somerville* v. *Hawkins,* 10 C. B. 583, the defendant had called in two other persons and spoke the slander in their presence, as well as of the plaintiff, and it was held not to be sufficient evidence to prove malice in fact to go to the jury: that these two persons having been fellow servants with the plaintiff, might properly be so spoken to.

In *Taylor* v. *Hawkins,* 16 Q. B. 308, a stranger was also called in by the defendant, and the slander was spoken of and to the plaintiff in the stranger's presence, and it was there held the Judge on these facts should not leave the question of malice to the jury.

In *Laughton* v. *The Bishop of Sodor and Man,* L. R. 4 P. C. 495, the plaintiff, a barrister, had as an advocate before the House of Keys in the Isle of Man, spoken very strongly against the defendant. The defendant in his charge to his clergy referred to the matter which had been before the House of Keys and to the plaintiff's language, and he used the following expressions of the plaintiff, that "arguments and language were employed with reference to myself which are not ordinarily used by any man of high professional repute, even when pleading before a common jury or a parish vestry;" that the plaintiff had made "slanderous statements;" that these statements were characterized by an "entire disregard to truth;" and that he, the defendant, was bound to protect his office "from the assaults of wicked men;" and the defendant sent his

charge to a newspaper for publication, and it was so published. The Deemster directed the jury that the reading of the charge and the publication of it in the newspaper were both privileged, and that they could only find for the plaintiff in case they thought the defendant had been actuated by malicious motives against the plaintiff and had exceeded his privilege, and they found a verdict for the plaintiff. The Court of Appeal of the Island set aside the verdict for the plaintiff, and entered it for the defendant.

Sir Robert Collier, who gave judgment in the Privy Council affirming the judgment, said, at p. 508: "Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications."

And at p. 509: "It is enough that, having regard to the circumstances and nature of the attack upon him, the Bishop may have honestly believed that everything which he said was true, and proper for his own vindication, although, in fact, some of his expressions exceeded what was necessary for it; and that the language of his charge is more consistent with such honest belief, and with the purpose of self-vindication, than with that of injuring the plaintiff."

And at p. 510: "Lastly, it was insisted that the sending of the charge to the *Manx Sun* was evidence of malice. This was, in itself, under the circumstances already adverted to, no such evidence, but if there had been evidence of malice *aliunde*, it would have been proper to put to the jury the question, whether the charge was sent to the newspaper *bonâ fide*, or maliciously in the sense before explained."

In *Spill* v. *Maule*, L. R. 4 Ex. 232, in Ex. Ch., on a bill of

exceptions to the ruling of Martin B., who held that notwithstanding the defendant had written to a creditor of the plaintiff that the plaintiff's conduct was "most disgraceful and dishonest," it was held that as the communication was privileged, the presumption was in favour of the absence of malice, and in order to rebut it the plaintiff must shew actual malice; and that as the act referred to by the defendant was capable of a two-fold construction, it must be assumed the defendant did entertain that view of the plaintiff's acts which induced him to believe, and honestly to believe and say, that the plaintiff's conduct was dishonest and disgraceful, and that unless proof to the contrary was produced it must be taken that the defendant did state no more than he might reasonably believe.

In giving judgment, Cockburn, C. J., said, at p. 237: "It is usually the safer course to take the opinion of the jury on the question of actual malice; but the presumption being here in favour of the defendant, and facts being stated by the plaintiff which were compatible with an honest belief on the part of the defendant that the plaintiff had acted in the manner described, we think that the learned Judge was right in his decision, and that there was no case to go the jury to rebut the presumption in the defendant's favour."

To describe the plaintiff's plans of ships of war in a communication to the admiralty as having "no weight from the known antecedents of their author," was held not to be an excess of privilege: *Henwood* v. *Harrison*, L. R. 7 C. P. 606.

Willes, J., at p. 628, said: "But it is not competent for the jury to find that, upon a privileged occasion, relevant remarks made *bonâ fide* without malice are libellous. * * In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the Court first to determine whether there is any evidence upon which an rational verdict for the affirmant can be founded. * * The privileged occasion shifts the burthen, and in respect of relevant words, though defama-

tory, the plaintiff cannot recover without proving malice, which he has failed to do. If the case had been left to the jury, and they had found for the plaintiff, it would have been the duty of the Court to set aside that verdict." See also *Lawless* v. *The Anglo-Egyptian Cotton & Oil Co.*, L. R. 4 Q. B. 262.

In *Hunter* v. *Sharpe*, 4 F. & F. 983, the plaintiff, a medical man, was described in a newspaper as a person who worked on the fears of the ignorant to obtain enormous fees, who terrified and plundered, who was guilty of very serious malpractices, and as an impostor and a scoundrel; and although such language was left to the jury, it was with the very strongest expression of opinion from Cockburn, C. J., who tried the cause in favour of the defendant. The jury found a verdict for the plaintiff with one farthing damages.

In *Kelly* v. *Tinling*, L. R. 1 Q. B. 699, the publication in a newspaper was held to be proper. So in *Wason* v. *Walter*, L. R. 4 Q. B. 73, in which the article described the plaintiff's charges, which he had made against a high judicial officer in a petition to the House of Lords, as "futile and malignant."

And in *Delany* v. *Jones*, 4 Esp. 191, in which a wife advertised for information whether her husband were married before a certain day, and offering a reward for such information.

In *Mulligan* v. *Cole et al.*, L. R. 10 Q. B. 549, the following publication in a newspaper was held no libel, and the plaintiff was nonsuited:—"Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the Institute has ceased, and that he is not authorized to receive subscriptions on its behalf." It was not shewn the plaintiff had tried to get any such subscription, but he had formerly been with the above Institute, and when he left he established another school in the same place called "The Walsall Government School of Art." See also *Brown* v. *Croome*, 2 Stark. 297.

I am of opinion that if the learned Judge had nonsuited

the plaintiff at the close of the whole of the evidence, he would have been justified in doing so. The words of the article in this case, "Caution," at the head of the company's advertisement, and concluding "N. B. Notwithstanding the false statements of Daniel Holliday to the contrary, he is no longer an agent of this company," are no different from the publication in *Mulligan* v. *Cole*, L. R. 10 Q. B. 549, than by containing the expression "false statements." The occasion was unquestionably a privileged one. Implied malice was therefore repelled. There was no sort of proof of evidence of malice in fact, unless the expression of "*false statements*" can be said to constitute such proof. Whether it did amount to evidence of it depended upon the testimony which was given at the trial. The evidence was to this effect:—The plaintiff himself stated that he had been in the defendants' employment in getting applications from the residents in the county; that he had obtained for them about 1,600 policies; that since he had left their employment he had gone into the service of the Isolated Risk Insurance Company, and that he canvassed actively for that company in this county, representing its advantages over that of the defendants' company; that his canvass was very freely carried on among the customers of the defendants; and that he did know pretty well when some of their policies with the defendants expired, and that he asked them if they wanted to be insured, or to insure again; but he denies he ever asked any of them if they wanted to *renew* their policies, or that he ever told them he was acting then as the agent of the defendants; but he did say he would have thought it no harm if he had asked them if they would *renew* their policies.

The defendants gave evidence that the plaintiff had asked several of the customers of the defendants to *renew* their policies, he knowing they were then or had lately been insured with the defendants, and that he did not tell them he had left the defendants' service and was acting for another company, and that they believed

he was acting for the defendants, and that when one of these persons told him he was not the agent of the defendants, he left and made no further request on that person to insure. The evidence shewed also very clearly that the defendants' officers were several times told of all these matters, and that the plaintiff was representing himself as their agent to the people he was applying to. The occasion was therefore privileged. The defendants published the article in defence of their rights and interests, and in the discharge of a duty which they owed to their policy holders, and to all others who would be likely to deal with them.

There was no pretence that the defendants were influenced by malice in fact. It was not alleged they did not honestly believe the truth of the matters so communicated to them, nor that they had not reasonable ground for so believing them.

Under these circumstances, was the charge that the plaintiff had made "false statements" too strong an expression to make use of? I think not, from the authorities before mentioned. The privilege repelled the implied malice, and the expression of "false statements" was not sufficient to leave to the jury under the evidence given as proof of express malice.

I am not now speaking of the manner of publication. I am assuming for the present that the communication was made only to the policy holders of the defendants, or at a meeting of their company or of the directors.

If the article complained of would not have been too strongly worded if it had been published only to the customers of the company, has it lost its privilege by being published in a newspaper of the county? I think it has not. A circular to each of the 5,000 policy holders of the company would probably have made it more notorious than its insertion in a local paper having a circulation of 700 or 800. But a circular to the policy holders of the company would not alone have answered, because the defendants were themselves looking for additional customers by

their different agents, and they had to communicate with those who were not customers as well as with those who were, and they could not do that in any other way less public than through the newspapers. Their customers were dispersed all over the county. Their field of operations was all over the county, and they had to counteract and correct the mischief and injury which they believed were being daily done to them by the plaintiff, their former agent, and they had to do so promptly and effectually.

I am therefore of opinion that if the learned Judge who tried the cause had assumed to deal with the case himself and nonsuited the plaintiff he would have been quite warranted in doing so, simply because the communication was privileged, and there was not the slightest pretence for saying or supposing there was any malice in fact, either from the language used or in the mode of giving it publicity.

But it is not necessary we should go so far, for it is a difficult matter to determine the line accurately when the Judge may and should, and when he should not take the decision into his own power and withdraw the case from the jury.

Here, as a fact, the question is upon the evidence expressly reserved to us to determine whether the privilege has been forfeited in any way. It was withdrawn from the jury for that purpose. The learned Judge's opinion was not in accordance with ours, but was plainly expressed to be in favour of the plaintiff, and for that reason, and because leave was reserved to the defendants to move, neither party desired the subject should be left to the jury.

There are many cases in which it is said that any excess of language, or a more public circulation of the defamation than was necessary, or where there is reasonable ground for alleging that there is excess or unnecessary publication, is a matter for the jury to determine, as in *Cooke* v. *Wildes*, 5 E. & B. 328; *Tuson* v. *Evans*, 12 A. & E. 733; *Finden* v. *Westlake*, M. & M. 461; *Blake* v. *Pilford*, 1 M. & Rob. 198; *Fryer* v. *Kinnersley*, 15 C. B. N. S. 422;

Wason v. *Walter*, L. R. 4 Q. B. 73; *Williamson* v. *Freer*, L. R. 9 C. P. 393.

In this last case the Chief Justice said, p. 594: "Is it not always a question for the jury to say whether or not the circumstances take the communication out of the protection of privilege?"

Upon the whole I think if the learned Judge had ruled there was a privilege in the case, and that the words "false statements" were not alone sufficient to establish malice in fact, and that the publication in the newspaper was not more than the defendants were justified in doing, he would have been quite warranted in ruling so upon the evidence before him, because there was not sufficient evidence given to make out malice in fact to be submitted to the jury.

But I am quite clear that in dealing with this evidence as it has been reserved to us the only conclusion I can form is wholly in favour of the defendants. There was a privilege. There was no malice in fact alleged or attempted to be proved. There was an honest belief entertained by the defendants, and upon very sufficient grounds, that the plaintiff was deliberately and systematically making false statements of his being their agent to their prejudice and for the purpose of subtracting their customers from them, and of preventing others insuring with them; and the language complained of affords of itself no evidence of malice, nor was the mode of publication an improper one under the circumstances, and there was therefore no sufficient evidence of malice in fact to be left to the jury.

But assuming that there was evidence for the jury the case has been left to us on the leave reserved, and we are of opinion that upon that evidence the finding should be for the defendants.

The rule will therefore be absolute to enter a nonsuit.

MORRISON, J., concurred.

HARRISON, C. J., was not present at the argument, having been engaged as counsel in the case, and took no part in the judgment.

Rule absolute.

The Queen v. The Corporation of the Township of McGillivray.

Bridge—Obligation to repair.

Defendants having been indicted for not repairing a bridge, it appeared at the trial that the bridge was not on the actual line of the road allowance, but upon land procured from a neighbour for that purpose, but it had been built by defendants as part of the road, and used for ten or twelve years until its injury by a flood in April, 1874. Defendants were indicted in June following, and contended that a bridge might be dispensed with at that place: that they had not had a reasonable time before the indictment to determine what they should do; and that it was in their discretion whether to build it or not. The jury found that the bridge was a convenience to the public or a portion of the public: that defendants had had a reasonable time to exercise their discretion; and that the private prosecutor, who had applied to them to repair it, had reason to conclude that they would not act, and they found defendants' guilty,

Held, that these were proper questions for the jury, and the verdict was upheld; but it was directed that no proceedings should be taken on it until defendants could shew cause why judgment should not be given against them.

This was an indictment found at the General Sessions of the Peace for the county of Middlesex, on the 9th of June, 1874, and removed by *certiorari* into this Court.

The indictment alleged that there was and is a common public wooden bridge in the township of McGillivray, in the Queen's common highway, known as and being the eighth concession line east of the centre road, in the township, used by and for all the liege subjects, &c. That the bridge, on the 1st of April, 1874 and, continually afterwards until the taking of the inquisition, was and is very ruinous, broken, dangerous, and in great decay for want of upholding, maintaining, amending, and repairing, so that the liege subjects, &c., to the great damage and common nuisance of all the liege subjects, &c.; and that the bridge is within the township, and that the township ought to make, rebuild, repair, and amend the bridge when and so often as it should or shall be necessary, according to the statute.

Plea: general issue.

Joinder.

The cause was tried at the sitting of Nisi Prius in the autumn of 1874, before Elliott, Co. J., of the said county, for and in the absence Gwynne, J.

The evidence shewed a bridge was built where it now is about twelve years before the trial, and that it had been repaired by the township several times since then; that altogether the bridge had cost about $400; the original building cost comparatively a small sum, as lumber and labour were both lower at that time than they are now.

There was a good deal of evidence given as to whether the bridge was a public convenience, or only a convenience for the few persons who lived near to it, and whether a bridge might not, in fact, be dispensed with at that place or not.

And it was shewn that the defendants had spent a great deal of money in building and repairing bridges in different parts of the township shortly before the trial; and that to put up a proper bridge in place of the one which is now there, with one end of it fallen down, would cost about $600 or $800, because some embankment would have to be done on one part and a good deal of cutting down at another, to prevent the bridge from being carried away or broken down by the sudden freshets, as it had been several times already.

It was also contended that it was a matter of discretion with the defendants whether to build the bridge or not; and, if they were bound to repair it, that they had not been allowed a reasonable time, from the damage done to the bridge by the floods in April, and the finding of the indictment in June, within which to determine what they should do, or in what manner, if they were to repair the bridge, it would be proper to do so; and that it was not really reparation that was wanted, but a new and expensive bridge which would resist the floods.

The jury found that the bridge was a convenience to the public, or to a portion of the public; and that a reasonable time was allowed to the council of the township in which to exercise their discretion before the finding of the indictment; and that Mr. Hindmarch (who applied to the council to repair the bridge,) had reason to conclude that the council would not act; and they found the defendants guilty.

In Michaelmas term, November 19, 1874, *Meredith* obtained a rule calling on the Attorney General for Ontario

and the private prosecutor to shew cause why the verdict should not be set aside and a verdict of not guilty entered, pursuant to leave reserved, on the grounds:—that the defendants were not bound to rebuild the bridge, and that there was no default in repairing it: or why a new trial should not be granted, on the ground of misdirection of the learned Judge, in ruling that the failure of the defendants to inform the private prosecutor, on his application to them, whether or not they intended to rebuild, or then leading him to believe that they did not intend to rebuild, was sufficient to establish a default in not repairing the bridge; and on the ground that the learned Judge refused to direct the jury to find whether or not, having regard to the time when the bridge was carried away and the time when the indictment was preferred, and having regard to the other statutory obligations of the defendants as to the repairing other bridges, a sufficient time had elapsed to enable the defendants to repair the bridge before the indictment was preferred; and that if they found in the negative they should find for the defendants; and that the questions submitted to the jury were not, nor are their answers thereto, sufficient to support a verdict of guilty, or for the determination of the matters in issue; and that the defendants were entitled to exercise a discretion whether they would rebuild or not, and that a *bonâ fide* exercise of such discretion could not be impeached; or why a new trial should not be granted on the ground that the verdict is contrary to law and evidence, and the weight of evidence.

In Easter term, June 4, 1875, *Bartram*, for the private prosecutor, shewed cause:—The whole question at the trial was, and at the present time is, whether the defendants are or are not bound to rebuild this bridge. All the other matters were well considered at the trial, and were found against the defendants. The following cases shew that the defendants are obliged as a duty to repair the bridge, although it may not be on the regular line of road, if the township adopted it as a road or public bridge way: *Regina* v. *Corporation of the Village of Yorkville*, 22 C. P. 431; *Regina* v. *Inhabitants of Horley*, 8 L. T. N. S. 382; *Regina*

v. *Inhabitants of Hornsea*, 1 Dears. C. C. 291; *O'Connor* v. *Township of Otonabee et al.*, 35 U. C. R. 73, Mun. Act, 1873, sec. 409.

Meredith supported the rule. The bridge was carried away by a flood in the spring of 1874, and the defendants have not rebuilt it. It was reported to the council that the bridge was not in a proper place, and it would be expensive to rebuild it. The question, as left to the jury, should have been whether the council had been allowed a reasonable time within which to rebuild, and not merely whether they had been allowed a reasonable time within which to decide whether they would rebuild or not: *The Company of Proprietors of Brecknock and Abergaveny Canal Navigation* v. *Pritchard*, 6 T. R. 750. There is a difference between civil and criminal proceedings as to repairing: *Regina* v. *Guardians of Epsom Union*, 11 W. R. 593; Mun. Act, 1873, sec. 413; *In re Kinnear and Corporation of the County of Haldimand*, 30 U. C. R. 398. The bridge in question is not on a high-way: *Ringland* v. *Corporation of the City of Toronto*, 23 C. P. 93.

February 4, 1876. WILSON, J.—As a fact the evidence shows the bridge is not upon the actual line as originally laid out for a road, but for some reason, a good one no doubt, it was built upon land procured from a neighbour for the purpose.

It was built about 10 or 12 years before the trial, by the township, as and for a part and continuation of the concession road, and it has been used since its construction until its injury by the flood in the spring of 1874, as a part of the common public highway. I must treat it as a highway.

It does not follow that the defendants are obliged to build the bridge on the very spot where it was first put up. They have a discretion to put it there or to change it to another and better locality, so long as it substantially supplies the wants of the neighbourhood and the public.

It may be that a bridge there may not be required at all, in which case the defendants would not be required to put one there, although one had formerly been there.

The jury have thought that a bridge is necessary for the public convenience.

The two chief grounds of defence were: that the defendants were not allowed a sufficient time after notification of the loss of the bridge to determine what they would do with respect to it, before they were prosecuted for not repairing; and that the defendants must be allowed some discretion in determining whether, consistently with their other duties and obligations throughout the township, they could spare the means for rebuilding the bridge, at the time they were called upon to do it, or could be required to raise money for the purpose.

These were questions for the jury, and they determined the first of them expressly against the defendants, because they were of opinion that defendants determined not to replace the bridge. They no doubt thought too that there was no sufficient reason why the work was not gone on with, or should not be proceeded with. The case of *Regina* v. *Corporation of the Village of Yorkville*, 22 C. P. 431, is in point as to the liability of the defendants to repair the bridge, although it was only a bridge by assuming it or by dedication: Mun. Act, 1873, sec. 409.

The effect of the verdict is, that there is a bridge which the defendants are bound to put and keep in repair; and that they had no lawful excuse for not repairing it. No proceedings will be taken upon the finding to compel the defendants to do the repairs, until they can shew cause why judgment should not be given against them; and if they are able to shew to the Court satisfactory cause why judgment should not be given, the Court may stay its hand for a time, so long as such cause exists. The legal questions, duty and obligation, only have so far been determined, and we think, on the evidence, properly against the defendants.

The rule will be discharged.

HARRISON, C. J., and MORRISON, J., concurred.

Rule discharged.

POTTS ET AL. V. THE CORPORATION OF THE VILLAGE OF DUNNVILLE.

Municipal corporations—Unauthorized expenditure—Liability for.

The plaintiffs sued defendants for lumber supplied to them for building an engine house, etc. Defendants pleaded that the claim was for a debt falling due in 1874, and was not within their ordinary expenditure during that year: that no estimate was made by them, nor an assessment or levy made to pay the debt, nor any by-law passed to create such debt or to impose a rate to pay it; and defendants had not in 1874, nor at the commencement of this suit, any moneys out of which to pay the same.

It appeared that by by-law passed on the 13th July, 1874, defendants appropriated $9,300 received from the Municipal Loan Fund for certain specified works to be done in the municipality, including that for which this lumber was supplied, but the expenditnre was over $12,000, and there was in that year a deficiency of $5,000, and more than two cents in the dollar would be required to meet this debt, with the other liabilities.

Held, that the plaintiffs could not recover.

DECLARATION on the common counts, for goods sold and delivered, &c., by Major A. Smith to the defendants, and by him assigned to the plaintiffs.

The defendants pleaded:

1. Never indebted.

2. That Smith did not assign to the plaintiffs.

3. Payment to Smith before assignment.

4. That the claim sued for was a debt falling due in 1874, and was not within the ordinary expenditure of the defendants during that year: that no estimate was made by the defendants, nor an assessment or levy made for payment of the debt, nor was any by-law passed for the creation of such debt, nor for imposing a rate for the payment thereof, and no such rate was imposed, and the defendants had not in 1874, nor at the commencement of this suit, any moneys out of which to pay the same.

5. In substance like the fourth plea.

6. Added at the trial: set-off as against Smith before assignment by him.

Issue.

At the trial the plaintiffs got leave to reply to the fourth and fifth pleas.

The replication was: that by an Act of the Province of Ontario passed in the 36th Vic., intituled "An Act respecting the Municipal Loan Fund debt, and respecting certain payments to municipalities," the defendants became entitled to receive from the Treasurer of Ontario the sum of $9,300 upon complying with the provisions of the Act; and the defendants, by a by-law passed on the 13th of July, 1874, appropriated the sum of $2,500, part of the said $9,300, for the purpose of draining and making water tanks on Lock street and Broad street in the said village.

The sum of $1,000, another part of the $9,300, for the purpose of grading, stoning, and draining Main street in the village.

The sum of $2,000, another part of the said $9,300, for grading, stoning and draining John street in the village.

The sum of $2,500, another part of the $9,300, for the purpose of building an engine house and engine room for the use of the fire company in the village.

And the defendants duly complied with the provisions of the said Act necessary to entitle them to receive the said sum of $9,300; and the defendants did receive the same for the purposes set forth in the said by-law in the year 1874, and the plaintiffs' claim is for materials furnished by the said Major A. Smith to the defendants, at their request, for the purposes aforesaid.

Rejoinder. 1. Issue on said replication. 2. That before the assignment to plaintiffs the defendants paid and satisfied the said Smith for all the materials furnished by him for the purposes of the said by-law. Issue.

The cause was tried at the town of Simcoe, at the Spring Assizes of 1875, before Burton, J.

There was a great deal of evidence given. The plaintiffs' claim was based upon an account rendered by Smith to the council of the village in 1874, in which, after very large payments had been made, there was a balance shewn of $1,161.23 as still due by the defendants.

In payment of that claim, the reeve gave two orders on the treasurer of the village to pay Smith. One of these

orders was for $615; the other was for $546.23=$1,161.23. The order for $546.23 was sold to one McDonald, and by him to one Cain, who commenced an action upon it in February, 1875.

There was a great mass of evidence given for the purpose of the plaintiffs shewing that Smith had furnished to the defendants all the lumber that payment was claimed for, and for the purpose of the defendants shewing that neither from the stuff which Smith had, nor from the materials laid upon the streets and applied to the other works for which the lumber was used, did Smith furnish, nor could he have furnished, so much lumber as he claimed payment for.

The learned Judge, as to the correctness of the claim, said to the jury: "The real question for their consideration was, as to the correctness of the plaintiffs' account, and upon that, apart from the loose way in which the account had been kept and the deliveries checked, Smith was aware of the measurement made by the defendants, and did not by evidence endeavour to impeach the measurement of Mr. Law (the engineer employed by the corporation to measure the lumber.) If they thought Mr. Law's evidence was correct, the payments already made by the defendants were in excess of the present claim, and the verdict should be for the defendants. But the matter was one entirely for them upon the whole evidence."

As to the other part of the case, the defendants' counsel contended that the defendants were only liable for the materials which were supplied under the by-law of the 13th of July, 1874, and that they were not liable for any part of the claim for which there was no by-law nor a rate struck, nor any estimate made for it, and as the rate was already two cents on the dollar there could be no valid debt created.

As to this the charge was:—"I tell the jury that although in the case of a contract for anything not coming within the meaning of ordinary expenditure, the contractor would have to satisfy himself either that there were funds

on hand or a by-law imposing a rate for its payment, that did not seem to me to apply to a case like the present, where the party merely tendered to deliver such lumber as the corporation might require during the year, especially in a case like the present, where the corporation had funds for a large portion of the expenditure, and it was impossible for the party furnishing the lumber to know what portion was applied to the purposes of the by-law, and how much to ordinary repairs and matters of that kind. That if so there would be but little security in dealing with municipal corporations; but as it might be open to much doubt, especially as some of the lumber was delivered before the passing of the by-law, I have reserved leave to the defendants to move to enter a verdict for them in the event of that view of the law not being correct."

It was agreed between the counsel for the parties that as to the order for $546.23, referred to in the case of *Cain* v. *Corporation of the village of Dunnville*, if the verdict for the plaintiff in that case should be rendered for that amount, that the verdict in this case should be reduced by the like amount.

The jury found a verdict for the plaintiffs, and damages, $1,661.46.

The facts are more fully stated in the judgment.

In Easter term, May 25, 1875, *Harrison*, Q.C., obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside and a new trial had, the verdict being contrary to law and evidence and the weight of evidence, and the Judge's charge, or to enter a nonsuit or verdict for defendants, upon the grounds of law which were stated at the trial.

In Hilary term, February 15, 1876, *McMichael*, Q. C., shewed cause. The legal objection is, that by the Municipal Act, 1873, sec. 258, this debt of the plaintiffs was not one incurred for the current annual expenses of the municipality, and that the rate levied for the year was at the maximum of two cents in the dollar; and it was not a debt

levied for by the rate of assessment imposed for the year. The claim, however, was for current expenses. If not, the by-law provided for the plaintiffs' claim, or a very large portion of it. The plaintiffs will still be entitled to a judgment, although they may not be able to make their execution available.

Bethune supported the rule. The by-law 139, of July, 1874, which provided for the appropriation of certain municipal moneys, has been exceeded by the expenditure. The plaintiffs have furnished much more lumber than was called for by the by-law. The effect of section 258 is to make void the contract, unless the plaintiffs can bring themselves within the protection of it. If the contract is void, the plaintiffs cannot have a judgment. This claim was not for current expenditure: *Cross* v. *The Corporation of the City of Ottawa*, 23 U. C. R. 288.

March 17, 1876.—WILSON, J. The by-law passed on the 13th of July, 1874, appropriated $9,300 of the Municipal Loan Fund, under the 36 Vic. ch. 47, for certain specified works to be done in the Municipality. The expenditure was $12,349.61, so that the by-law appropriation was largely exceeded. By the auditor's report at the end of 1874, the treasurer had

On hand	$ 68 16
And there was due for arrears of taxes	2,880 57
Making of assets	$2,948 73
And the liabilities unpaid were	7,995 95
Leaving a deficiency for the year of	$5,047·22

There was, therefore, nothing on hand to pay this claim if it were due by the defendants.

Sec. 258, 36 Vic. ch. 48 O, provides "That the council * * shall assess and levy on the whole ratable property within its jurisdiction a sufficient sum in each year to pay all valid debts of the corporation, whether of principal or interest, falling due within the year, but no such council shall assess and levy in any one year more than an aggre-

gate rate of two cents in the dollar on the actual value, exclusive of school rates; provided always if * * the aggregate amount of the rates necessary for the payment of the current annual expenses of the municipality, and the interest and the principal of the debts contracted by the municipality at the time of the passing of this Act shall exceed the said aggregate rate of two cents in the dollar on the actual value of such ratable property, the council * * shall levy such further rates as may be necessary to discharge obligations already incurred, but shall contract no further debts until the annual rates required to be levied within such municipality are reduced within the aggregate rate aforesaid."

Here is a provision that the two cents in the dollar may be exceeded, if at the time of the passing of the Act (29th March, 1873), the obligations of the municipality were such as to require a higher rate; but the municipality is expressly prohibited from contracting any further debts until the amount is reduced to within the two cents.

It is a prohibition to levy more than two cents in the dollar in any one year, and to contract any further debts until the rate is reduced to a sum within the aggregate rate.

Here the debt was contracted for a sum which, with the other liabilities, required more than the two cents for the aggregate purpose. That is in direct violation of the statute.

The object was to protect the ratepayers against excessive expenditure, and to protect the ratepayers of one year from paying the liabilities of a previous year, or of previous years; to prohibit a retrospective rate, which, but for the express enactment, it would not be illegal to levy: *Harrison* v. *Stickney*, 2 H. L. 108, 125; *Corporation of the County of Frontenac* v. *Corporation of the City of Kingston*, 30 U. C. R. 584, 600; *Regina* v. *The Churchwardens of All Saints, Wigan*, 9 L. R. Q. B. 17. See also *Southampton Dock Co.* v. *Southampton Harbour & Pier Board*, L. R. 14 Eq. 595.

The plaintiffs' claim was not incurred for and in respect of the ordinary expenditure of the municipality. Tenders

were advertised for, and lumber, to the amount of about $3,600, was supplied for a great deal of unusual work in the village, consequent on the possession of so large a sum from the Municipal Loan Fund. The expression in the statute is "current annual expenses," which would cover salaries of officers, ordinary repairs and works of that kind, but not erecting an engine house or constructing extensive *sewer* works. The very term "current *annual* expenses" shews that it refers to that which must be provided for year by year, as distinguished from that which is to last for many years.

I think the fourth and fifth pleas were and are substantially proved.

It may be said there is a great hardship on the plaintiffs, who are the assignees of Major A. Smith, who supplied the lumber. But it is not a question of hardship or no hardship. It is whether these municipalities are to involve themselves in debt to the distress and annoyance of the ratepayers.

Mr. Smith need have run no risk. He had a right to demand money for his lumber as it was delivered. As he did not do that he must bear the consequences of his own default.

In this particular case, I cannot say there is any special hardship.

The engineer of the village says the whole quantity of lumber furnished for the year 1874, was:

136,276 feet of pine at $18 a M.	$2,453 00
2,201 feet of oak at $28 a M.	61 60
2,125 feet, running measure, which I cannot make out a price for, but call at $20 a M. ...	42 50
Total.....	$2,557 10

While Smith has been paid $2,450; and still he claims $1,161.46.

These accounts cannot be both correct; and if we had not disposed of the case upon the legal grounds which were discussed, we should have been obliged to have sent the

cause for a new trial, simply because there was, so far as we can see, no trial at all between the parties. There was nothing found but a verdict, and nothing determined. It may happen when the debt is plainly found for the plaintiff, and correctly found, that he may be entitled to a judgment, although he can make no use of it. The expression in section 258, already referred to, appears to prevent the contracting of any debt beyond that which the two cents in the dollar will enable to be paid. That being so, there can be no liability in contemplation of law, and therefore no judgment for the supposed debt. The *postea* should be in favour of the defendants upon the third, fourth and fifth pleas, and for the plaintiffs on the first and second pleas.

The rule will be made absolute to enter the verdict for the defendants on the third, fourth, and fifth issues, and for the plaintiffs on the first and second issues.

MORRISON, J. concurred.

HARRISON, C.J., having been engaged in the case while at the bar, took no part in the judgment.

Rule accordingly.

Henry L. Vanzant and Joseph Alsop v. John B. Burke and George Boley Stock.

Sale of land—Agreement—Construction—Liability of interest.

Defendants being in possession of land as tenants under the plaintiffs for a year at $100, they, on the 26th of October, 1865, entered into an agreement under seal, by which it was witnessed that the plaintiffs sold to defendants the premises which it was said they had leased from the plaintiffs "with this understanding of purchase." The plaintiffs were to give the defendants credit "on purchase money for all rents or moneys paid or that shall be paid until the time of the first parties (plaintiffs) making the title, and said party to make the title by the 1st January, 1868, or as soon as he can get the acknowledgment of his father to a deed that is now made, and in possession of said first party; and the said first party to pay ten per cent. on all moneys paid by the second party over $100 a year, until the said title be made. The second party (defendants) agrees to pay for the above property $2,000, in three equal annual payments, after the deduction of such money as has been paid at the making of the title." Defendants continued in possession until 1870, paying various sums.

Held, that up to 1st January, 1868, when the title should have been completed, the seller was not to receive interest nor the benefit of the rents, if the purchase went on, but that after that date the purchaser remaining in possession was bound to pay interest.

Special Case.—This was an action of ejectment which came up for trial before Richards, C. J., at Whitby, at the Spring Assizes of 1875.

After the case was closed the defendants raised certain objections to the plaintiffs' right to recover, and thereupon and after argument, an agreement was arrived at in the following words: "It is agreed that a verdict be taken for the plaintiffs, subject to a special case to be made up and submitted to the Court." And a verdict was entered for the plaintiffs, and one shilling damages, subject to the above.

Pursuant to the said agreement the following special case was agreed to, namely:—

In 1865 one Dr. Armstrong was in possession of the premises, lot number one on the south side of Main street, in the village of Brougham, as laid out on a plan of part of lot number nineteen, in the fifth concession of Pickering, under a lease from Michael Vanzant, under whom the plaintiffs claim. This lease was assigned to the defendant

Stock, and he went into possession thereunder on the 14th of October, 1865, and became the tenant of the said Michael Vanzant for one year, at $100 rent, and he paid $100 rent therefor on the same day.

Thereafter an agreement was entered into between the parties in the following words :—

" Brougham, October 26th, 1865.

" This Agreement made by and betwen Michel Vanzant, of the village of Brougham, County of Ontario, Canada West, carpenter and builder, of the first part, and George B. Stock, of the same place, Manufactor, of the second part, witnesth, the party of of the first part sells to the partey of the second part the house and Lot known as the Wm. Bentley house, ocupied at present by Mrs. Lamoreux, she being put in position by said Stock, as he, the said Stock, had least it from the partey of the first part with this understanding of purches, and said first partey is to give said second partey credit on the purchis money for for all rents or moneys paid, or that shall be paid untill the time of the first parteys making the titel, and said partey to make the title by the first of ganury, 1868, or as soon as he can git the acknowlagement of his, (Vanzant's) Father, to a deed that is now made and in position of said first partey, and the said first partey to pay 10 per cent on all moneys paid by the second partey over $100 a year untill the said titel be made. The second partey agrees to pay for the above property $2000, Two thousand dollars, in three equal annual payments, after the deduction of such moneys as has been paid at the making of titel.

Witness our hand and sels this day and date above writen.

" Witness, M. VANZANT.
" P. WOODRUFF. GEO. B. STOCK."

The defendant Stock continued in possession personally or through his tenants, one of whom is the defendant Burke, from the said 14th of October, 1865, paying various sums of money, receipts for which were given, in which it was called " rent or payment" until the year 1870. On November 4th of that year $70 was paid " on house rent," and on the 28th of October, 1871, $100 was paid "on account of rent."

In 1870, Michael Vanzant gave defendant Stock a notice to quit, and told him that he wanted $125 a year and taxes, and in October, 1872, when rent was due, a dispute arose as to whether Stock was to pay $125 a year and taxes—Stock objecting to pay taxes. They left the matter to arbitration as to what would be a fair rent to be paid by Stock, and the award was that Stock should pay $125 without taxes, and a receipt was then given in the following words:—

"Brougham 29 Oct 1872

"Received from George B Stock the sum of one hundred and twenty five dollars being rent in full for the last year—say up to October eighteen hundred and seventy two.

JOHN VANZANT,
H. C. V."

The writ herein was issued on the 13th day of November, 1874.

The following are the questions submitted to this Court:

1. The defendant Stock contends that he is bound to pay by instalments as set out in the agreement only after good title was presented, and that he is entitled to credit on the purchase money for all sums paid by him, amounting to about $1000.

2. The plaintiffs contend that if such credits be allowed, the defendant Stock is chargeable with rent for the nine years that he has been in possession of the premises.

If the Court should be of the opinion that either of the plaintiffs' contentions is correct, then the verdict is to be increased to $1600, with costs of suit, but if the Court should be of the opinion that the defendants' contention is correct, then the verdict is to be increased to $1000, less defendants' costs of suit.

On payment of such amount as may be due by defendants to plaintiffs, this verdict is to be set aside, and the plaintiffs to convey to the defendant Stock, in fee, by deed, the said lands—said deed to contain usual covenants, with bar of dower, if any.

And this Court is to have power to make any necessary amendments in the pleadings and proceedings to enable the parties to enforce the above terms of the agreement, and to enable the Court to enforce the same by judgment or decree, or to pronounce such judgment as they may consider just.

In Hilary term, February 26, 1876, *J. K. Kerr* argued the case for the plaintiffs. The contention of the defendant Stock is, that, although in possession of the land, he is free from both rent and interest so long as he has not actually received a conveyance of the land, and that all the payments which he makes in the meantime, whether called rent or otherwise, must be applied, by the terms of the agreement, in reduction of the principal sum of purchase money; while the plaintiffs insist that by the agreement, fairly and reasonably construed, the vendee must, being in possession, pay either rent or interest upon his purchase money until the conveyance is made. The rule in such a case is well settled to be in favour of the plaintiffs' contention: *Dart* V. & P., 3rd ed., pp. 628, 629; *De Visme* v. *De Visme*, 1 Mac. & G. 336, 353; *Sugden* V. & P. 178, 627, 8th Am. ed., from 14th English ed.; *Birch* v. *Joy*, 3 H. L. 565; *Great Western R. W. Co.* v. *Jones*, 13 Grant 355; *Brady* v. *Keenan*, 6 P. R. 262; *Ackland* v. *Gaisford*, 2 Madd. 28. The vendee is liable for rent because the lease, which he had at the time of the contract for purchase, was not put an end to, and especially as the plaintiffs had first to make out a good title; and, in the meantime, it is expressly held that the lease continues to subsist, otherwise the defendants would be trespassers by continuing in possession without express leave to that effect: *Doe Gray* v. *Stanion*, 1 M. & W. 695; *Grant* v. *Lynch*, 14 U. C. R. 148; *Grant* v. *Lynch*, 6 C. P. 178. He also cited *Doe d. Dettrick* v. *Dettrick*, 2 U. C. R. 153; *Doe d. Crookshank* v. *Crookshank*, M. T. 5 Vic. Rob. & Har. Dig. 263; *Coupland* v. *Maynard*, 12 East 134; *Doe d. Egremont* v. *Courtenay*, 11 Q. B. 702; *Doe d. Biddulph* v. *Poole*, 11 Q. B. 713; *Kenney* v. *Wex-*

ham, 6 Madd. 355; *Sweetland* v. *Smith*, 1 Cr. & M. 585; *Brooke* v. *Champernowne*, 4 Cl. & F. 589.

M. C. Cameron, Q. C., contra. The rule is not disputed, as contended for, as the one which governs in ordinary cases of contract between vendor and purchaser. The defendants depend altogether upon the plain and express words of the contract, which are, that the vendor is to give the vendee credit for all rents or moneys paid until the making of the title, which is to be made by the 1st of January, 1868, or sooner if the vendor can get the acknowledgment of his father to a deed then in his possession. That agreement shews the intention of the parties was that no interest or rent was to have been paid at any rate until the 1st of January, 1868; but as the vendee contends not until he actually got his title from the vendor. *Sweetland* v. *Smith*, 1 Cr. & M. 585, is really against the plaintiffs, and *Birch* v. *Joy*, 3 H. L. 565, was a case where the rule was strained in order to do what was thought to be justice between the parties. The true question is, what is the construction of the contract?

March 17, 1876. WILSON, J.—The agreement between the parties must, of course, determine what their rights are, but it is not always quite easy to say what their agreement is.

By this agreement the vendor sells to Stock, whose tenant is in possession, the property in question, which Stock had leased from the vendor "with the understanding of purchase."

The agreements then provides that the vendor is to give the purchaser "credit on purchase money for all rents or moneys paid, or that shall be paid until the time of the first party making the title, and the said party to make the title by the 1st of January, 1868, or as soon as he can get the acknowledgment of his, Vanzant's, father to a deed that is now made and in possession of the said first party."

The defendants may admit, for the purposes of this case, that the lease was not determined by the contract of purchase, and that rent was still to go on under it notwith-

standing the contract, because it is expressly provided that "all rents or moneys paid or that shall be paid" until the making of the title, shall be credited for purchase money; and the price of $2000 to be paid by the purchaser for the property is to be paid "after the reduction of such money as has been paid at the making of the title."

There is nothing whatever inconsistent with the purchaser paying rent, although the contract for purchase is continuing, because by the terms of the agreement the rent which is or may be paid is to be deducted afterwards from the purchase money, when the title is completed. Of that purchase money the vendor is to receive $100 a year at any rate, and all which is paid beyond that amount he is to pay to the purchaser 10 per cent. interest upon it.

Such an agreement is not an unreasonable one, when it appears the title at furthest was to be made by the 1st of January, 1868, or as soon as he could get the necessary acknowledgement of a deed which he then had in his possession from his father.

The vendor might have got the acknowledgement at any time from his father after the 26th of October, 1865, and then he would have been entitled to the whole of the purchase money in three annual instalments. But he was to complete the title by the 1st of January, 1868, in any event.

Until that time, in my opinion, he was not to receive interest nor the benefit of the rents, if the purchase went on.

The terms of the agreement are, I think, plainly and directly against such a construction.

The question is, whether the like rule applies after the day for performance by the vendor to complete his title has gone by, and up to the time the title is made, whenever that may be?

The general rule being, that interest becomes payable upon the purchase money from the time at which a good title is shewn, and the contract ought to be completed: Per Lord Cottenham in *De Visme* v. *De Visme*, 1 Mac. & G. 336, 353; or, as said by Lord St. Leonards, L. C., in *Birch* v. *Joy*, 3 H.L. 565. "From the time at which the purchaser was to

take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed owner of the purchase money, and that purchase money not being paid by the man who was receiving the rents would have earned interest, and that interest would have belonged to the seller as part of his property."

And as the parties here *intended* the 1st of January, 1868, as the latest day permitted to the vendor by which he was to make such title, I am of opinion it cannot be presumed they were contracting in so one-sided a manner that if a title were not made by that day the vendee was to remain in possession, paying the rent, not for the benefit of the landlord, but in reduction of his own purchase money, and then to claim the fee simple of the property without ever paying for it. And that opinion is strengthened by the fact that the landlord was also to pay ten per cent. upon all money paid by the vendee over $100 a year, the effect of which would be that while the vendor was losing his rent or losing his estate out of which it issued, he was not only losing the interest on the purchase money, but was actually paying an excessive interest to the vendee upon such part of the money which was paid in advance of $100 a year.

I do not see anything in this contract which expressly gives the vendee all the rents, and acquits him from all interest on the purchase money after the day the parties named and contemplated when the title should be perfected.

And that which might not have been unreasonable up to the 1st of January, 1868, may become utterly unreasonable, and beyond the intention of the parties and the meaning of their agreement, by being applied for a series of years after that day.

The case of *Birch* v. *Joy*, 3 H. L. 565, was in some respects like the present.

If the delay from the 1st of January, 1868, had been the fault of the vendee, there can be no doubt he would

have been obliged to pay interest: *DeVisme* v. *DeVisme*, 1 Mac. & G. 336, 353. But I think, looking at all the circumstances of the case, that the ordinary rule between vendor and vendee should be given effect to when the day had arrived with respect to which the parties were evidently contracting for the completion of the title, and that rule is, that while the vendee is in possession, receiving the rents, he should be chargeable with interest. I do not say I am wholly free from doubt, but it is a construction not opposed to the agreement, and it probably gives true effect to the intention of the parties.

As I think the purchaser was to pay interest from the 1st of January, 1868, the verdict should be for the plaintiffs, and Stock, the defendant, should pay to the plaintiffs $1,600, and the costs of this suit.

HARRISON, C. J.—I concur. In the ordinary case of a contract for the sale of land, the vendee in equity becomes the owner of the land, and the vendor the owner of the purchase money.

If the vendee be in possession under the contract, or go into possession under the contract, he ought to be charged with interest on the purchase money. See *Rhys* v. *Dare Valley R. W. Co.*, L. R. 19 Eq. 93.

Where the vendee has the use both of the money and the land, it would, in the absence of a clear agreement to the contrary, be unreasonable to hold that the vendee is not liable either for interest for the use of the money or rent for the use of the land.

I do not assert that an agreement might not be so framed as to have just such a result, reasonable or unreasonable, but I am of opinion that the agreement in question here is not so framed.

I think, therefore, that the general rule must apply, and the verdict be increased to $1,600, with costs of suit.

MORRISON, J., was not present at the argument, and took no part in the judgment.

In re The Stratford and Huron R. W. Co. and The Corporation of the County of Perth.

Railway bonus—Application for mandamus to issue debentures--Commencement of the work—Omission to file plans.

A county by-law was passed on the 12th December, 1873, to aid a R. W. Co. by a bonus of $80,000, and to issue debentures therefor, under the authority of the clauses of the Municipal Act of 1873 then in force. The by-law required that the debentures should not be delivered to the trustees appointed to receive them until the company should have agreed that the amount thereof should be wholly expended upon the construction of the line within the county: that 75 per cent. of the amount should be advanced as the work progressed on the engineer's certificate, and the balance on completion of the road; and that the portions of the railway within the county should be commenced within one and finished within three years from the passing of the by-law.

On application for a mandamus to the county to deliver these debentures to the trustees, it appeared that on the 24th of November, 1874, the company, by agreement with the county, after reciting the by-law, covenanted to commence that part of the road within the county in one and complete it in three years from the passing of the by-law; and that they would only ask for the proceeds of the debentures, as to 75 per cent. thereof "to pay for work done *and expenses incurred* during the progress of said work within the county, and as to 25 per cent. thereof to pay for work done and expenses incurred on finally completing said railway within the county, and that the whole proceeds of the debentures should be expended in the construction of the said railway within the county, and not otherwise or elsewhere." This agreement was handed to the Warden on the 7th of December, 1874, (within five days of the time limited by the by law for commencing the work), but was not executed by the county, and on the same day the debentures were demanded. The company had in that month made some purchases of rights of way. On the 4th of December they entered into a contract with one C. for the construction of 14 miles of the road within the county, to be begun within five days and completed by 1st of September, 1875, but it contained a clause enabling the company to suspend the work at any time without being liable for damages. C. began work on the 10th of December, and continued till the 15th of February, 1875, for which he received about $800. He was told that he must begin by the 12th of December in order to enable the company to get the debentures.

The company had not filed their plans and survey as directed by the Railway Act, C. S C., ch. 66, without which they had no authority to begin their work, and were bound to no particular route.

Held, in the Queen's Bench, that the company were not entitled to the mandamus, for they had not legally located their line, and were bound to no route; they had no power to begin the work as they had done; and from all the facts, more fully stated in the case, it appeared that they had not done so in good faith.

Semble, that there was not a sufficient variance between the agreement required by the by-law and that executed by the company to have alone furnished an answer to the application, though they were not clearly identical.

Per HARRISON, C. J.—The whole matter was one of contract, and the company, if entitled to the debentures, had another remedy, either at law or in equity, which would be more convenient and appropriate than a writ of mandamus.

The company had a line of 100 miles to construct, which would cost $1,500,000. Their capital stock was only $50,000, of which not quite ten per cent. had been paid up; and including the whole stock, and the bonuses granted, they had only $160,000. *Quære*, per WILSON, J., whether before ordering the debentures to be handed over, the Court could have required more stock to be called in. *Semble*, not; but it was suggested that the by-law should provide for this; and that to carry such by-laws a certain proportion of the whole number of votes of the locality should be required.

On appeal from the above judgment, DRAPER, C. J. of Appeal, and PATTERSON, J., were of opinion that the mandamus was properly refused—BURTON, J., and MOSS, J., that it should have been granted, The Court being thus equally divided, the judgment was affirmed, without costs.

Per DRAPER, C. J., and PATTERSON, J.—The omission to file the plans, &c., was a fatal objection, for without this, under C. S. C. ch. 66, sec. 10, the execution of the railway could not be proceeded with.

Per BURTON, J., and MOSS, J.—The absence of an adequate legal remedy was a sufficient ground for granting a writ of mandamus, notwithstanding the existence of an equitable remedy; and since the Administration of Justice Act, 1873, the applicant for such a writ should succeed on disclosing a case which would entitle him to relief in equity. Per MOSS, J.—This writ is not now invested with any prerogative character in this Province; and it would be a convenient rule, upon applications for it, to act upon principles similar to those which govern a Court of Equity in suits for specific performance.

Per BURTON, and MOSS, JJ., the financial status of the company could not properly be considered as forming a ground of decision.

Per BURTON and MOSS, JJ., admitting the construction of sec. 10 C. S. C. ch. 66, sec. 10, to be that the execution of the railway could not be proceeded with before filing the plans, and not, as contended, that the section relates only to the compulsory power of the company as to taking lands, &c., the omisssion could not, under the facts of this case, be held a sufficient answer to the application.

IN Michaelmas term, November 26, 1875, *F. Osler*, as counsel for the county of Perth, obtained a rule calling upon the Stratford and Huron Railway Company to shew cause why the order of Mr. Justice Morrison, made herein on the 22nd November instant, so far as the same orders that a writ of *mandamus* should issue, commanding the said county to issue debentures of the county to the amount of $80,000, in manner directed by by-law No. 191 of the said county, and to deliver the same to the trustees of the said railway company for the use of the said company, should not be rescinded, and why the summons for the

said *mandamus* should not be discharged with costs, on the ground that upon the facts and circumstances appearing upon the affidavits and papers filed before the learned Judge in Chambers, the same should not have been granted.

A by-law was passed by the county, No. 191, dated 12th December, 1873.

It was passed to aid the Port Dover and Lake Huron Railway Co. by granting $40,000 as bonus, and to aid the Stratford and Huron Railway Co. by granting $80,000 as bonus, and to issue debentures for the same, and to levy a special rate for its payment with interest. It was passed under the authority of the statutes permitting aid to be granted to the said railway companies.

It recited that the railways would, when constructed, form a continuous line through the county from the southerly to the northerly limit of it.

The debentures were to be delivered, within six months after the passing of the by-law, by the Warden to Trustees to be appointed under the Acts relating to the said respective companies.

The by-law was passed, subject to the following conditions :—

1. The Warden shall not deliver the debentures, or any of them, until each of the railway companies shall have agreed, under their respective corporate seals, that the amount of such debentures to be received by them respectively shall be wholly expended upon the construction of their respective lines within the limits of the county.

2. That the debentures shall be advanced in the following manner, that is to say : *(a)*. Seventy-five per cent. of the amount as the work progresses, on the certificate of the engineers thereof respectively, *(b)* and the balance on the completion of the railways ; *(c)* and also that the portions of the said railway within the County of Perth, shall be commenced within one year, and completed within three years from the passing of the by-law.

The by-law was to take effect on the 15th December, 1873.

On the 24th of November, 1874, the Stratford and Huron Railway Co. made an agreement with the county of Perth After reciting the by-law, the company covenanted with the county:

1. That the company would commence that portion of the railway to be constructed within the county within one year from the date of the passing of the by-law, and would complete that portion of the line within the limits of the county within three years from the date of the passing of the by-law.

2. That the company should not ask from the trustees any portion of the proceeds of the debentures at any other time, in any other manner, or for any other purpose than as to 75 per cent. thereof to pay for work done, and expenses incurred during the progress of the said work within the said county, in the proportion as before recited; and as to 25 per cent. thereof to pay for work done and expenses incurred on finally completing in running order the said railway within the limits of the county. And that the whole proceeds of the debentures should be expended in the construction of the said railway within the county, and not otherwise or elsewhere.

On the 14th of April, 1875, the President of the company wrote to the Warden, desiring him to hand over the debentures to the amount of $80,000, under the by-law, to the trustees appointed under the company's charter, as the company had done everything necessary to comply with the by-law. The trustees were named, and it was said they would meet the Warden at any time and place the Warden might appoint, to receive the debentures.

On the 19th of the same month the Warden answered that the County Council had some time lately appointed a committee to investigate the financial condition of the said companies, and the prospect there was of the completion of the roads: that Mr. Moore, the president of the P. D. & L. H. R. Co., had appeared before the committee and satisfied the committee that they were in a position to build the road, which the committee reported, and the

Council at once passed a resolution instructing him (the Warden) to deliver the debentures for $40,000 to that company, which was done.

That if the S. & L. H. R. Co. were prepared to shew a similar position they would be dealt with in the same manner.

That the members of the Council considered it would be great folly to hand over $80,000 of the peoples' money to be spent by the directors and leave the works half completed. Members of the Council who canvassed and did their utmost for the by-law, voted and spoke against the debentures being handed over to the company. He said he concurred in their views, and he would not hand over the debentures until he was satisfied that the company had a financial standing to build the road, and intended to act in good faith in carrying out the promises made to the ratepayers.

The Warden also said that although *ex-officio* a director of the railway company under sec. 471 of the Municipal Act, he has never been notified to attend any of the meetings of directors: that there was no bond or agreement, as required by the by-law, as to the commencement and completion of the road, in the hands of the municipal officers, and he had never seen such a document.

The president of the company, on the 30th of June, 1875, made an affidavit in which he said: "The refusal of the Warden and County Council to execute and deliver the debentures has been highly injurious to the company, and has caused it to suspend the construction of the railway, which was commenced largely depending upon the aid of the debentures, since such construction would involve the directors and shareholders in great personal expense and probably fatally embarass the company if such debentures be permanently withheld."

He said, on the sale of the debentures granted to the P. D. & L. H. R. Co., he handed the duplicate agreement between the S. & H. R. Co. and the county, and the duplicate demand of the last company on the county for the deben-

tures in question, to W. B. Beatty, (a member of the firm of Beatty, Chadwick & Lash, barristers,) who was then acting for a purchaser of the debentures for his inspection, and Mr. Beatty said the papers are lost; the deponent does not know where they are, nor has he seen them since.

Peter Watson, the secretary of the company, made affidavit on the 2nd of July, 1875, that on the 2nd of September, 1874, there was $48,850 of the capital stock of the company subscribed and ten per cent. of it paid into and it was then lying in the Merchants' Bank of Canada at Stratford.

On the 1st of December, 1874, the company gave notice to the Warden that the agreement handed him with the notice was executed by the company under the by-law 191, and he names the three trustees who have been appointed to receive a delivery of the bonds; and he requests that the Warden shall forthwith deliver the debentures to the trustees, to be held and applied upon the trusts, for the purposes, and in the manner prescribed by the by-law and the statutes in that behalf.

Frederick W. Patterson made an affidavit on the 8th of July, 1875: that on the 7th of December, 1874, he, with the notice, delivered to the Warden a duplicate of the said agreement between the company and the county.

Benjamin B. Vandusen made affidavit on the 17th of June, 1875: that he acted as assistant engineer of the company during the progress of the work, afterwards mentioned: that the contractor, Jeremiah H. Canty, commenced work on the 9th of December, 1874, and continued steadily prosecuting it until about the 1st of February after, when the depth of snow compelled him to desist: that the work was commenced on the line of railway in the township of Mornington in the county, and was continued towards Stratford, a distance of three miles. The work consisted of clearing timber, grubbing and grading the road, and preparing it to receive the ties and rails.

On the 4th of December, 1874, the company entered into a contract with Jeremiah H. Canty, that the latter should

construct and complete in the most substantial manner that part of the line lying between Milverton and Stratford, grading at 19¾ cents per cubic yard, clearing and grubbing at $29.50 per acre, according to the specifications: the work to be begun within five days and finished by the 1st of September, 1875. The company retained the right to suspend the work at any time for any reason, without being liable for damages for so doing.

Mr. Canty, in his affidavit, made on the 13th of August, 1875, said he began work on the 10th of December, 1874, and continued work till the 15th February, 1875, when the severity of the weather and the great depth of snow compelled him to desist: that since then he had been informed by the President of the company that, in consequence of the county not giving the debentures, the deponent could not further proceed with the work: that during the spring and summer following he repeatedly applied for an order to proceed with the works; but he always got the like answer, that until the county gave the debentures the company would not be in a position to proceed with the works: that he graded the line from Milverton towards Stratford for a distance of more than a mile, leaving therein spaces for culverts and bridges, as directed by the engineer, and in one or two places where the surface was very deeply frozen; but, except where such spaces occur, the said line is continuously graded for the said distance, the actual quantity of grading being 4,300 feet. The surface of the grading was perfectly level and ready for the ties and rails when he left the work in February; but as frost prevailed during the time the work was being done, the surface has settled here and there to a slight extent, but could be levelled now at an expense not exceeding $100. In addition to the grading and the clearing of timber on the greater part of the line, all of which is completely cleared, he cut down the timber and cleared the whole width of the railway, 66 feet, for a distance of 1,800 feet through the bush, removing all the logs, except on one-third thereof, which, from the depth of snow, had to be

left. In all, he completely cleared 7 $\frac{85}{100}$ acres, and partially cleared about three acres more. The whole of the work done is on the first three miles from Milverton in the direction of Stratford: that he took the work and entered upon it *bonâ fide* with the full intention of completing it, and he had no reason to apprehend, nor did he apprehend, that the work would be stopped for any reason; nor was he ever informed so until after he had been obliged to desist in February.

Albert D. Wright, the engineer of the road, made affidavit on the 9th of September, 1875, and said that before Canty commenced work, plans and surveys and profiles of the railway had been prepared; but it was found impossible to comply with all the provisions of the statutes in regard to filing plans and books of reference with the Clerk of the Peace: that the portion of line on which Canty had done work was on the route surveyed and finally adopted, and that there was no intention of or necessity for changing the route of the railway throughout that part thereof.

Valentine Kertcher, of Mornington, a director of the company, said various agreements of purchase of land had been made with owners along the line:

1 is on No. 6 in 3rd Concession of Mornington.
2 " " " " " "
3 " " " 2nd " "
4 " W.½ " 4th " "
5 " " 7 1st " "
6 does not mention the lot or concession.

Peter Watson said, in his affidavit of the 23rd of August, 1875, that the stock subscribed at the time of the election of directors in September, 1874, was $51,350, but 10 per cent. only on $48,850 was paid up.

Many, perhaps all, of the directors of the company made affidavit, as did also Mr. *Wright* and Mr. *Watson*, that the contract with Mr. Canty was a *bonâ fide* contract, and that there was no intention to stop the work under it until after the county had refused to deliver the debentures.

Thomas Storey said—The terminus of the road was Strat-

ford, and we told Canty the object of the clause giving the company the right to suspend his work was to enable us to stop if we did not get the debentures. He was told he must commence work by the 12th of December, 1874, to enable us to get the debentures (this being on the 4th of December), as required by the by-law, as the county would take advantage of delay. When the by-law in question was passed, it was understood that another and further bonus should be granted, and generally spoken of, and that the local municipalities would grant bonuses. The length of the road would be 100 miles, and through the county of Perth about 35 miles. The road cannot be made without bonuses. We expected bonuses to the amount of $5,000 a mile. We did not call in more capital till we saw that we could get the debentures. Regular plans of the road were made, and the route, from Milverton to Stratford, 14 miles, was agreed on, except part of Ellis, through the Canada Company's land. For it we were negotiating with the Canada Company, as to crossing a marsh through their lands. The Board intended to complete the line to Milverton, and run it as soon as possible, and it was supposed the P. D. & L. H. R. would reach Stratford, and that they would run it for us in connection with their own. The rails of the Port Dover road are now being laid. December was a favourable time to begin the work to enable the contractor to get through the swamps. The county voted $80,000, Normanby $50,000, and Stratford $30,000. The Normanby grant is conditioned that it be spent in the township, and passing through it on the line laid out. $14,000 a mile is the estimated cost of the line, including rolling stock. The south part of the county are opposed to the issue of debentures, as they don't think they have any benefit from it.

Samuel Street Fuller, the president of the company, said the line through Mornington is about four miles. The survey from Milverton to Stratford was adopted just before it was let out for contract. Profiles and plans of the road were made. After the route was adopted, we entered into

agreement for right of way. By the by-law, we have to go through Normanby if we go to the Georgian Bay. The distance is about nine miles through Normanby. The estimated cost of the whole line is $15,000 per mile, with equipage: 100 miles to Milverton. The reason we commenced in December was to shew we intended to build the road, and with a view of getting other bonuses. When the first section was finished we intended getting it run by the Port Dover or by the Grand Trunk. I am of opinion, with the bonuses, expected Government grant, and by sale of bonds, the road can be built. It was understood we were to have had a by-law of the county Council grouping several municipalities. With the bonuses we have we could build the first section. The reason the County does not issue the debentures is, that the south part of the county is against the issue—and so vote it down—and some of the northern townships were opposed to it.

The county filed affidavits as follows: *Wm. Davidson* made affidavit, on the 3rd of August, 1875, that he was Warden of the county: that he objected to deliver the debentures, as did also the County Council, on several grounds. The principal ones were:—

1. That the company had not executed and delivered such an agreement as is required by the by-law—the agreement made enabling the trustees to apply the moneys to be derived from the debentures in a manner and for purposes other than as authorized by the by-law.

2. That the company had not *bonâ fide* commenced the construction of the railway within the time limited by the by-law, that is, within one year from the 12th of December, 1873, what they had done being merely a colourable compliance with the by-law, as work is stated to have been commenced only three days before the 12th of December, and continued for a very short time after the January meeting of the County Council in 1875.

3. That the company had not, as he ascertained by a search made on the 3rd of August, 1875, in the office of the

Clerk of the Peace for the county, deposited any map, plan, or books of reference of the railway or any part of it.

4. That from a search made on the same day in the registry office of the north riding of the county, through which it is said the railway is intended to be constructed, he was unable to ascertain that any conveyance of any land in the said riding to the company had been registered.

5. That the company had been unable, although requested so to do, to shew to the County Council such a financial statement as ought to justify them in carrying on the construction of the railway, or the county in delivering the debentures, and thereby imperilling the moneys of the ratepayers of the county.

6. That after diligent enquiry made by him, he had ascertained that no call or calls whatever had been made by the company for the payment of any part of the subscribed stock, and that not even the whole of the ten per cent. instalment required so be paid in had been paid.

7. That on the 30th of July, 1875, he visited that part of Mornington, and the only part through which he could find by enquiry in the neighbourhood that it was proposed the railway was to run, and he also ascertained by actual inspection that only 263 rods or thereabouts of the track of the proposed road had been partially graded, but by no means sufficiently so to receive the ties and rails; and that the timber for about half a mile in addition had been chopped, but not in continuation of that portion partially graded.

8. That from careful enquiry at the time of the people through whose land the partial construction had been made, and in the neighborhood, he was unable to ascertain that the company had procured a single conveyance of any parcel of land or made any more than verbal agreements therefor: that he never saw the agreement with the company until the 28th of July last, and there never was to his knowledge any agreement between the company and the county before the Council for acceptance, and he was a member of the finance committee of the Council long

before the passing of the by-law continuously to the time of his affidavit.

James Trow, Reeve of North Easthope, made affidavit to the like effect.

Wm. Davidson, on the 17th of August, 1875, made a further affidavit: that in a conversation he recently had with Thomas Storey, Storey admitted to deponent that the company had not in good faith commenced the construction of their road within one year from the passing of the by-law, and that the work which had been done on it was done merely with a view of enabling the company to say they had complied with the terms of the by-law, so as to claim the debentures, and for that purpose only; and that the contract with Canty contained a clause enabling the company to suspend or put an end to the contract at any time they pleased.

Ebenezer Rutherford made affidavit on the 16th of August, 1875. He said that from conversations had by him with Samuel S. Fuller, David Tisdale, and Valentine Kertcher, directors of the company, the deponent believed —and it was so intimated by them to the deponent—that the work on the proposed line of railway in Mornington was done with a view of enabling the company to say they had complied with the by-law so as to claim the debentures. He also said he was a stockholder to the amount of $250, and that no call had ever been made on him for more than ten per cent. of the stock, and the ten per cent. was all he had paid upon it.

Moses McFadden, a surveyor, stated the work done in Mornington by the company, which was about the same as it had been represented by Mr. Davidson.

In this term February 25, *R. Smith* (of Stratford) shewed cause. It is objected that the words in the agreement between the company and the county, "and expense incurred during the progress of the said work," is a variation from the terms of the by-law, and will enable the company to expend the money granted by the county for other

purposes than "upon the construction of its line within the limits of the said county." That is not so. The money is to be applied according to the agreement "for work done and expenses incurred during the progress of the said work within the said county." The two statements mean the same thing—at any rate the whole expenditure is to be "within the county." If the agreement is wider than the by-law the company is willing to correct it: *In re Neal's* Trusts, 4 Jur. N. S. 6; *Walsh* v. *Trevanion*, 15 Q. B. 733; *Jenner* v. *Jenner*, L. R. 1 Eq. 361; *Boulton* v. *Hugel*, 35 U. C. R. 402. Then it is said there was not a *bonâ fide* commencement of the work by the company within the year from the passing of the by-law. The County Council have mistaken their position and rights. The beginning of the work within the year was not a condition precedent to the company's right to have the debentures delivered to them, because the debentures were to have been given to them within the period of six months from the passing of the by-law, and therefore without any regard to the company beginning work upon the line before claiming the debentures. The company had the right to have the debentures delivered to the trustees before they did a day's work upon the line, and it was right it should be so, for they could not be expected to begin so serious a work without having the funds beforehand. It was the want of these debentures which prevented and delayed the work being gone on with; the blame of it rests with the county. It was next objected that the company had not filed their plans, &c., shewing the selection of their line of road. These provisions of the statutes have relation to the proprietors and owners of lands, notifying them of the lands taken, and that they are to be settled with for them: Consol. Stat. C. ch. 66, sec. 129. The plans were not filed as soon as they might have been by reason of negotiations which were going on between the railway company and the Canada Company about traversing their lands and getting a bonus also from the Canada Company: *In re London, Huron &*

Bruce R. W. Co. and the Corporation of the Township of East Wawanosh et al., 36 U. C. R. 93, and *Luther* v. *Wood*, 19 Grant 348, do not apply here, for in these cases the work had not in fact been begun in time, while here it was; the *Wawanosh case* is not binding on the Court because it was the decision of a single Judge: Administration of Justice Act, 1873, sec. 21. The by-law created no contract between the company and the county. The company cannot bring an action on the by-law. Their only remedy is by *mandamus: Rex* v. *The Bishop of Chester*, 1 T. R. 396, 404; *Rex* v. *St. Katherine's Dock Co.*, 4 B. & Ad. 360; *Rex* v. *The Archbishop of Canterbury*, 8 East 213; 35 Vic. ch. 14, O.; *Richardson* v. *Canada West Farmers' Mutual and Stock Insurance Co.*, 16 C. P. 430, 435. The granting of the writ is a matter of discretion. Here the discretion was exercised by the learned Judge in chambers, and no appeal lies against the exercise of a discretionary power: *Beioley* v. *Carter*, L. R. 4 Ch. 230: *Booth* v. *Turle*, L. R. 16 Eq. 182, 187; *Radford* v. *Willis*, L. R. 7 Ch. 7.

Osler, contra. The work which was done by the company was not such a beginning of work as was contemplated by the by-law or provided for by the agreement or by the statute: 36 Vic. ch. 87, O.; 38 Vic. ch. 55, O. Section 11 of the last mentioned Act gave to the company six months from the 21st of December, 1874, within which to commence the work, so far as that time depended upon a statute. But what the company did was not a commencement of the railway, nor done with that purpose. It was for a collateral purpose altogether—to get possession of the debentures without doing any work whatever. Section 8 of the same Act enabled the county to extend the time to the company if it saw fit to do so. But it has not done so. Consol. Stat. C. ch. 66, sections 9, 10, 11, and the subsections shew what is meant by commencing the work. [HARRISON, C. J.—This court is not prepared to differ with Mr. Justice Morrison on the question of *bona fides*.] Assuming the *bona fides:* then as to the neglect of filing

the plans. That is an objection which can not be got over, because they must be filed before the work can be begun. There has, therefore, been no line yet lawfully adopted. The company can alter their route as they please until the plans have been filed, and although they say they have adopted the line of survey for their settled route of 14 miles between Stratford and Milverton, they may, notwithstanding anything they have done, shift it and change it as they please. They have not bound themselves to buy any land; they have paid nothing for land. All they have done is, to bind a few of the land owners to sell to them at a certain rate per acre; but they are not bound to take any land: Consol. Stat. C. ch. 66, sec. 129. As the work has not been begun, either according to the statutes or to the by-law and agreement, the bonus promised has failed, and the claim to it is determined. The Court should also consider whether there is a reasonable probability of the road ever being completed. The distance is 100 miles; it is said it will cost $14,000 a mile for construction and equipment, equal to $1,400,000, and all the company has to reckon upon as assets are, the stock, say..... $50,000
These County Debentures..... 80,000
And Stratford Bonus..... 30,000

In all.....$160,000

The Wawanosh case does apply here. Besides, the agreement of the company with the county does materially differ from the terms of the by-law. The company may by the agreement apply the money of the county to purposes against the provisions of the by-law, and never contemplated by the county. The by-law has, therefore, never been accepted by the company on the terms on which it was offered to them, and they have forfeited all right to any benefit from it. The company has a remedy by suit, and need not, therefore, apply for a *mandamus*; the by-law and agreement constitute a complete and binding contract between these bodies which may be enforced by action at law: *Tapping* on Mandamus, 9, 10, 11. The

decision of a single Judge, as in the Wawanosh case, is the decision of the full Court, and must be treated as such. For these reasons the order of the learned Judge in Chambers in this case, ordering a *mandamus* to issue, should be rescinded. The remedy—if there is one—is by action, but for the reasons already urged there is no remedy either by action or by *mandamus*.

March 17th, 1876. WILSON, J.—There is a difficulty in dealing with cases of this description. The facts are not only disputed and the interests great, but private claims are opposed to what may be called public rights. The municipal body, too, is not always at one with itself. And to refrain from enforcing the bonus may sound like a breach of faith to the railway company, which has entered on a great enterprise, and assumed heavy responsibilities, and whose work may be frustrated without the promised aid which is now withheld; and yet to compel the payment of the bonus may be a loss to the ratepayers, who may get nothing for the money which they granted only for an equivalent, and subject to the special provisions of their gift.

The first question is, whether the agreement of the company with the county, dated the 24th of November, 1874, varies from the terms of the by-law.

The Company's Charter, 36 Vic. ch. 87, sec. 17, O., authorizes municipalities "which may be interested in securing the construction of the said railway, or through any part of which, or near which the railway or works of the said company shall pass, or be situated, to aid and assist the said company by loaning or guaranteeing, or giving money by way of bonus, to the company."

And by sec. 29: "Whenever any municipality * * shall aid, loan, guarantee, or give money or bonds, by way of a bonus, to aid the making, equipment and completion of the said railway, it shall be lawful for said company to enter into a valid agreement with such municipality, binding the said company to expend the whole of such aid, so given, upon works of construction within the limits

of the municipality granting the same, or upon such other portion of the said line of railway as the said municipality may see fit to direct."

The by-law was passed and bears date the 12th of December, 1873, and it was to take effect and come into operation on, from, and after the 15th of December, 1873. It was passed before the 37 Vic. ch. 16, sec. 22, O., repealed the sections of the Municipal Act enabling aid to be given by municipalities to railway companies.

The by-law provides "that the Warden shall not deliver the debentures until the railway company shall have agreed under its corporate seal that the amount of such debentures to be received by it shall be wholly expended upon the construction of its line within the limits of the said county of Perth."

And the agreement of the company provides that the company "shall not ask for or receive from the trustees any portion of the proceeds of the debentures at any other time, in any other manner, or for any other purpose than as to seventy-five per cent. thereof to pay for work done and expense incurred during the progress of the said work, within the said county of Perth, in the proportion as hereinbefore recited, and as to twenty-five per cent. thereof to pay for work done and expense incurred in finally completing in running order the said railway within the limits of the county, and that the whole proceeds of the said debentures shall be expended in the construction of the said railway within the said county, and not otherwise or elsewhere."

And it is said that while the by-law has required the money to be wholly expended "upon the construction of its line within, the county, the company have by their agreement assented only to apply the money "for work done and expenses incurred during the progress of the said work," within the county of the railway.

The company have, however, at the close of the same clause of the agreement, these words, "that *the whole proceeds* shall be expened *in the construction of the said railway* within the county, *and not otherwise* or elsewhere."

I think the company could not have compelled the county to accept the agreement in its present form. It is true, it does say the whole money shall be expended in the construction of the line and not otherwise, but that is not altogether consistent with the previous part of it, that it was to be applied in paying for work done *and expense incurred* during the work and in finally completing it in running order.

The term "expense incurred," it may be argued, might cover the purchase of the right of way, or payments made for the preliminary costs of surveys and plans, and other charges not within the words "the construction of its line."

The phrase means, as I think, the actual formation of and completion of the line through the county, including, of course, the materials, stone, timber, iron, &c., to be used in that work, and the payments made for teams, dredges, and other engines working on the road. I do not think it would include the cost of the preliminary survey, nor the cost of roadway, but it might include the cost of fencing the sides of the land taken by the company. The *construction* must mean more than the manual labour done and materials supplied; it must embrace overseers' wages and the engineer's daily inspection, and plans for work as well.

I cannot say the two instruments provide as plainly as might have been done for precisely the same thing. The expense incurred is something in addition to the work done. It may have been intended to cover only the expenditure to which I have alluded beyond the work—that is, beyond the manual labour done—namely, the charge for materials used and of overseers and other necessary officers, who do not in one sense do manual labour upon the line. I am, after some doubt, disposed so to read it, because the concluding part of the clause is, that the whole proceeds shall be expended *in the construction* of the said railway within the county, *and not otherwise* or elsewhere.

And I feel sufficiently certain to say that the company could be compelled to appropriate the money of the county

in the construction of the line of railway in the manner and to the extent I have mentioned, and that they would be enjoined from applying it to any other purpose than that of construction properly construed.

Then as to the neglect of filing the plans. That is an argument used by the county for the purpose of shewing the company did not do the work in question *bonâ fide* for the purpose of constructing their road, but only to get possession of the proceeds of the debentures, because it is said, notwithstanding such work done, the company are not bound to adopt that part where the work has been done as any portion of their line, for that they may alter it and vary it as they please, so long as they have not bound themselves to a particular locality by the filing of the plans.

The Consol. Stat. C. ch. 66, which governs this railway as to plans, &c., provides:

Section 10, sub-section 1, that surveys and levels should be taken and made of the lands through which the railway is to pass, together with a map or plan thereof, and its course and direction, and of the lands intended to be passed over and taken therefor, so far as then ascertained; and also a book of reference for the railway, in which shall be set forth: 1. A general description of the lands. 2. The names of the owners and occupiers thereof, so far as they can be ascertained; and 3. Everything necessary for the right understanding of such map or plan. 2. The map or plan and book of reference shall be examined and certified by the person formerly performing the duties formerly assigned to the Surveyor-General or his deputies, who shall deposit copies thereof in the offices of the Clerks of the Peace in the districts or counties through which the railway passes, and also in the office of the Provincial Secretary, and shall also deliver one copy thereof to the said company. 5. Any omission, &c., may be rectified.

7. If any alterations from the original plan or survey are intended to be made in the line or course of the railway, a plan and section, in triplicate, of such alterations as have been approved by Parliament, on the same scale and con-

taining the same particulars as the original plan and survey, shall be deposited in the same manner as the original plan, and copies or extracts of such plan and section, so far as relate to the several districts or counties in or through which such alterations have been authorized to be made, shall be deposited with the clerks of such districts and counties.

8. Until such original map or plan and books of reference, or the plans and sections of the alterations have been so deposited, the execution of the railway or of the part thereof affected by this alteration, as the case may be, shall not be proceeded with.

11. Deviations of not more than one mile shall be made.

The law seems to be clear enough on this point, that the execution of the railway shall not be proceeded with until the map or plan and books of reference have been deposited as the statute requires.

The map or plan and books of reference are binding on the company; any change intended to be made in the original plan or survey must be allowed by Parliament; but deviations within one mile may be made by the company.

The road begins at Stratford; but its other terminus is very indefinite. It may be at "Owen Sound and the village of Wiarton, or to either of these places; or to some other point or points on the Georgian Bay, within the counties of Grey or Bruce, that may seem most expedient for establishing a terminus or termini of the said railway": 38 Vic. ch. 55, sec. 1, O.

I am of opinion the company had not the right or power to begin the work they did between Milverton and Stratford, because at the time they did so their maps or plans and books of reference had not been duly filed and certified, and they were not bound down nor committed to any particular line or course of roadway.

The circumstances connected with the doing of this work, taken in connection with the want of map, plan, or books of reference, being duly deposited and filed, so as to

bind the company to a particular locality, are, in my opinion, very suspicious.

Although the debentures were to be given by the county to the trustees within six months after the passing of the by-law, yet they were not to be delivered over until the company had executed an agreement with the county to the effect before stated.

The six months expired on the 12th of June, 1874, for the giving over of the debentures, but at that time the company had not entered into the agreement with the county, and so was not entitled to require the debentures to be given to the trustees.

That agreement was executed only on the 24th of November, 1874, within nineteen days of the expiry of the year within which the company was to have begun their work according to the by-law and agreement, and it was handed to the Warden on the 7th of December, 1874, and the same day the company made a demand on the Warden for the delivery over of the debentures—that is, within five days of the expiry of the year within which the work was to have been begun.

Two of the rights of way purchases, are dated on the 7th December, 1874, two on the 8th, one on the 10th, and the last on the 12th of December, shewing that everything was postponed until the very last moment.

Canty's contract was made on the 4th of December, 1874, and he began work on the 10th of the month and continued it till about the middle of February, 1875, when he left, in consequence, as he says, from the depth of snow and the severity of the weather, and for which work he received about $800. Canty was told the work was to be begun by the 12th of December, and must be begun by that day to enable the company to get the debentures; and Canty's contract contained a clause enabling the company to stop his work at any time.

It is quite evident the company were not in a position to begin the work by the 12th of December, 1874, from the want of the depositing and filing of the plans, &c., and it is also evident that they were not bound down to any par-

ticular route or line by that day; and that the work they did to the extent of $800, and the rights of way they contracted for, but on which they had paid nothing, were in no way binding on them to continue the work on that route or to take the lands they had contracted for. They remained at that time, and are so at the present time, so far as we know, as free as they ever were to run their line from any place in Stratford to any part of the Georgian Bay within the counties of Grey or Bruce, and to carry it through any townships they please to that point.

And it is evident their object was, to bind the county to the giving of the debentures, while they were not bound to their line of road, and could not therefore do work in the construction of their line within the terms of the by-law and agreement which would have been either lawful or binding upon them.

I have disposed of the objection as to not beginning the work in due time by what I have said as to the want of filing the plans, &c., as the two matters are so much identified with each other.

We have been asked to consider the propriety of interfering in a case of this kind when there is no reasonable probability of the road ever being finished.

The company has a line of 100 miles to construct, and it is said it will cost $15,000 a mile to make and equip; the cost of it will therefore be $1,500,000; and to do that work the company has a capital stock of about $50,000, and bonuses of the county and of Stratford to the extent of $110,000, or, in all, less than one-ninth of the cost of the undertaking.

The county pressed with much force that as their gift was in aid only of the company, it would be as well if the shareholders, who had not paid up yet quite ten per cent. of the $50,000 capital, would call in some of the stock in place of calling in only the bonuses which were promised to them. I do not feel sure we could do anything for the county in that respect. They should, perhaps, have provided for that in their by-law; and it would be well if

all municipalities protected themselves by a clause that their bonus should be paid over only when the stockholders had paid up their shares in full—or in proportion to it as it was paid up. There would be some better guarantee for the reality of these schemes than there is at present.

It seems strange that the Legislature should incorporate a company with such enormous powers, and requiring an outlay of $1,500,000, with a capital of only $50,000, and with the right to begin business on paying ten per cent. upon $25,000—or, in other words, with $2,500 in cash—to build a road which will cost six hundred times that amount, and with authority to worry the municipalities along their line by petitions from a few freeholders to grant bonuses and to submit by-laws to be voted upon, in which business all the enthusiasm is on the side of the company and its active, and very probably not wealthy, but what is better, interested friends; while the main body of the municipality is passive or indifferent about the vote, although in reality they are by no means friendly to the project.

The only way to counterbalance this excessive partisanship of the few or the needy and expectant, would be to require a certain number of votes to be given for the by-law in proportion to the total votes of the locality.

As a rule, it is not the wealthy or the tax-paying portion of the community which carries these and the like by-laws, but the poorer classes, who are more easily influenced by various personal considerations—for a vote is a vote, and one vote is as good as another in such a cause.

It is not necessary to consider whether an action would or would not lie against the county. They have not executed the agreement, and I do not suppose the company could recover anything from the county but a specific performance of the terms of the by-law, through the instrumentality of a *mandamus* or some equivalent proceeding in a Court of equity.

Upon the whole, I am of opinion the company is not

entitled to the writ of mandamus which was directed to issue. They have in no wise performed their duty towards the public, the municipalities granting the bonuses, or to the few land owners with whom they professed to contract. They have not located their line. They are not bound down to any particular route. They had no power to begin the work which they did. They did not do it, from all the facts of the case, in good faith, and the county should not be ordered to hand over the large sum of $80,000 to or for a company which has so acted.

The county has dealt liberally with the Port Dover line. There is no doubt the county will deal as liberally with this company if the company can only be persuaded to comprehend the difficult lesson, in matters of this kind, for any railway company to learn, that they have duties to perform towards others as well as rights to be preserved for themselves.

The county has in this case dealt fairly with the company, and it has honestly stood by the interests of the freeholders, who are entitled to all the protection that can be given where railway bonuses are concerned.

In my opinion, the order for the granting of the mandamus should be rescinded, and the summons on which it was founded discharged, and this rule should be made absolute.

HARRISON, C. J.—It seems to me that the whole matter here may be fairly said to rest in contract, and that if the county are bound to hand over the debentures, and refuse to do so, the railway company have a remedy either at law or in equity.

Mr. Justice Gwynne, in *Re London, Huron & Bruce R. W. Co. and the Corporation of the Township of East Wawanosh et al.* 36 U. C. R. 93, was of opinion that in such a case the remedy of a railway company in a case very much like the present is in equity.

The granting of the writ of mandamus is subject to the discretion of the Court, and that discretion is not generally

exercised in favour of granting the writ where there is adequate remedy by action or suit.

It is much more convenient that matters of fact in dispute between parties should be heard and determined by oral testimony before the ordinary tribunals of the country, rather than by affidavits on an application to the Court or a Judge for summary interference by a writ of *mandamus*.

If I were satisfied that the railway company, on the facts now before the Court, had a right to the debentures, and that there was no adequate remedy either at law or in equity to compel the county to perform their duty, I should have no hesitation in granting the writ asked.

But I am not satisfied either that the company has the right, or, having it, that they are without adequate remedy other than writ of mandamus, and I therefore think the writ should be refused, and the order of Mr. Justice Morrison rescinded, and the summons discharged.

Rule absolute.

From the foregoing judgment the Stratford and Huron R. W. Co. appealed, on the following grounds :—

The writ of mandamus is the proper remedy, and the appellant is entitled to the same, because—

1. It appears from the affidavits and evidence that the appellants were entitled to a delivery of the said debentures to the said trustees, and the respondents did not answer the affidavits of the appellants or cross-examine the deponents under 35 Vic., ch. 14, O., sec. 6, so as to shew there was a conflict of evidence requiring a trial by some other tribunal.

2. There is no contract between the said appellants and the said respondents on which the appellants can maintain an action or suit against the said respondents. The by-law passed by the said respondents does not constitute a contract binding on them; it merely makes a gift, and implies conditions on its receipt by the appellants, and the agreement in pursuance thereof is executed by the appellants

only: *Luther* v. *Wood*, 19 Grant 348; *The London, Huron & Bruce R. W. Co. and The Corporation of the Township of East Wawanosh*, 36 U. C. R. 93.

3. There is no remedy at law other than by mandamus, and in such event the writ will be granted, even if there should be another remedy in equity: *Rex* v. *Bishop of Chester*, 1 T. R. 396, 404; *Rex* v. *St. Katharine's Dock Co.*, 4 B. & Ad. 360; *Rex* v. *Archbishop of Canterbury*, 8 East 213.

4. As there is no contract binding upon the respondents, the appellants have no remedy at law or in equity, save a writ of mandamus.

5. Under 35 Vic., ch. 14, O., sec. 12, which gives an appeal to this Honourable Court, matters in respect of which a writ of mandamus is an adequate remedy should be finally disposed of, and the writ either granted or refused on the merits, and not on the ground that some other remedy may exist.

6. Even where the remedy sought is in the discretion of the Court, it shall fully and finally decide, where the proper materials for decision, as in this matter, are or can be brought before the Court: *Beiole* v. *Carter*, L. R. 4 Ch., 230; *Booth* v. *Turle*, L. R. 16 Eq., 182; *Radford* v. *Willis* L. R. 7 Ch., 7.

7. The power of cross-examination of deponents under 35 Vic., ch. 14, sec. 6, O., coupled with the provision of the Common Law Procedure Act, sec. 188, enables a party to an application under the first mentioned Act to try the questions so thoroughly and fully as to remove the necessity for an action or suit.

8. All the terms and conditions of the said By-law thereby imposed on the appellants, and to be by them, fulfilled in order to entitle them to a delivery of the said debentures to the said trustees, were, as the affidavits, exhibits and evidence shew, duly complied with before the commencement of the proceedings herein.

9. The agreement between the appellants and respondents under the said by-law complied with the requirements thereof. It recites the portion thereof material to the said

agreement, which purports to be made in pursuance of the same. This recital contains all the operative words, including the words "and expense incurred during the progress of the said work," making their meaning fall within the terms of the by-law: *Jenner* v. *Jenner*, L. R. 1 Eq. 361; *Ringer* v. *Cann*, 3 M. &. W. 343, 349; *In re Neal*, 4 Jur., N. S. 6; *Walsh* v. *Trevanion*, 15 Q. B. 733, whilst the concluding passage "and that the whole proceeds of the said debentures shall be expended in the construction of the said railway within the said county, and not otherwise or elsewhere," distinctly limits the expenditure to the object contemplated by the by-law.

10. Even if the wording of the agreement should not be exactly within the terms of the said by-law, the appellants should have been allowed to execute and deliver an agreement in accordance therewith, as they submitted to do in the Court below: *Boulton* v. *Hugel*, 35 U. C. R. 402.

11. The work done upon the said railway was, as appears from the evidence, so done *bonâ fide*, with the intention of complying with the requirements of the said by-law, and in fact does comply therewith.

12. The said by-law does not make the commencement of work upon the railway a condition precedent to the delivery of the said debentures to the trustees, but simply requires the execution of the said agreement as such condition.

13. The said appellants were not restrained by any statute or law from commencing work upon the line of their railway before complying with the requirements of Consol. Stat. C., ch. 66, sec. 10, with reference to surveys, levels, maps, plans, and books of reference, and the examination certificate and deposits of the same, inasmuch as such provisions only apply to the compulsory power of the appellants with regard to taking and using lands, while in this matter the work so done on the said railway was so done on lands voluntarily sold to and purchased by the said railway,

14. Even if such maps, plans, and books of reference had

been made and deposited, the appellants could still have abandoned the work done on the said railway, by a deviation, not exceeding one mile, therefrom, or to any extent, under Consol. Stat. C., ch. 66, sec. 129.

15. The financial position of the appellants should not have been considered by the Court below, and should not have influenced the decision appealed against.

16. There is no evidence that the appellants are unable to construct their line of railway beyond the County of Perth. It appears they have not yet applied for bonuses to the municipalities outside the said county, through which the said railway will run ; and it appears from the evidence that they are able to construct the railway within the said county.

17. The evidence shews that the delay in commencing the work was unavoidable, that the trustees appointed by the municipalities and the Lieutenant-Governor of the Province of Ontario, were not appointed until the 20th day of November, A.D. 1874, and the 3rd day of December, A.D. 1874, respectively, before which time no demand for a delivery of the said debentures could be made, and that from the time the directors were elected, all possible proceedings were taken to hasten the commencement of the work ; and that the delay in the election of directors arose solely from the fact that the stock was not sooner subscribed.

18. The non-payment of subscribed stock in full by the stockholders is no ground for refusing the said writ of mandamus ; and even if it were a ground for such refusal, it should not, in this matter, be treated as such, since it would be useless to call in and expend the subscribed stock, if the appellants should not receive bonuses under the said by-law.

The following are the respondents' reasons against the appeal herein :—

1. The respondents will rely upon the reasons and arguments appearing in the judgment of the Court below.

2. The granting or refusal of the writ of mandamus, whether at common law, or under the 35 Vic. ch. 14, O. is

in the discretion of the Court, to be exercised upon a consideration of all the facts and circumstances of the particular case, and such discretion was rightly exercised in the present case, by refusing the writ.

3. The appellants had not, in fact, complied with the terms and conditions of the by-law, by which the bonus was granted, either by the delivery of the agreement stipulated for by the respondents, or by the commencement of the road, and they had become unable to comply with such terms and conditions; and if the debentures had been delivered to the railway trustees before the expiration of the year mentioned in the by-law, the respondents would have been entitled, under the circumstances existing at the end of the year, to restrain the trustees from handing them over to the appellants: *Luther* v. *Wood*, 19 Grant 348.

4. If the bonus is, as the appellants contend, a matter of gift, and not of contract, it is proper to take into consideration the circumstances referred to in the judgment of the Court below, such as the probability of the appellants being able to construct the road, the fact that no call had been made on the stockholders, and the *bona fides* of the alleged commencement of the road.

5. The appellants have not shewn themselves to be entitled to the writ of mandamus asked for, and their right to the same could have been more conveniently and satisfactorily tried in a Court of Equity.

September 15th, 1876. The appeal was argued *(a)* by *McMichael*, Q.C., and *R. Smith* for the appellants, and *F. Osler* for the respondents.

The arguments were substantially the same as in the Court below, and are not repeated here for that reason.

September 28, 1876. DRAPER, C. J. of Appeal. [After stating the facts.]—This case is to my mind eminently

(*a*) Present, DRAPER, C. J. of Appeal; BURTON, J.; PATTERSON, J.; MOSS, J.

unsatisfactory, for assuming that it is one in which, from its general features, the prerogative writ of mandamus might be granted, it is but indifferently supported in its details, and there seems to me to be a fatal omission to establish some indispensable matters. But before entering into these, I desire to express my concurrence in the observations of Mr. Justice Wilson on a part of the case.

My learned brother states: "It seems strange that the Legislature should incorporate a company with such enormous powers, and requiring an outlay of $1,500,000, with a capital of only $50,000, and with the right to begin business on paying ten per cent. upon $25,000—or, in other words, with $2,500 in cash—to build a road which will cost six hundred times that amount, and with authority to worry the municipalities along their line by petitions from a few freeholders to grant bonuses and to submit by-laws to be voted upon, in which business all the enthusiasm is on the side of the company, and its active and very probably not wealthy, but what is better, interested friends; while the main body of the municipality is passive or indifferent about the vote, although in reality they are by no means friendly to the project."

And while it is not easy to over-estimate the value of railway communications in promoting the settling of a country like Canada, and in advancing its commercial prosperity, we must not shut our eyes to the fact that there are dangers also to be avoided or prevented, not merely by legislation, but by the foresight and good sense of the community. Promoters of new railway lines will not be wanting who will regard their own interests while professedly advocating the public advantage. In the dearth of capital, raising money by debentures, payable at a future day is a convenient resort; and the demand for labour and produce gives a temporary spur to settlement; but at the same time interest is accruing, and the holders of property must be taxed to pay it, and in the distance looms the principal, a burden fastened on the community.

The Act incorporating the appellants was passed on the

29th of March, 1873. Twenty-four provisional directors were appointed, with power to open stock books, procure subscriptions of stock, and make a call on stock subscribed, and with the general powers conferred by the Railway Act; and as soon as $25,000 of stock was subscribed, and ten per cent. thereon paid, to call a general meeting of subscribers for the election of seven directors of the company.

Their secretary states, on affidavit, that "diligent efforts" were made by the provisional board to procure subscriptions, but not until the 25th of August, 1874, were shares to the amount of $25,000 subscribed for, and the company's counsel said the subscription was obtained with difficulty.

On the 2nd of September, 1874, the seven directors were elected, a year and a-half after the company was incorporated, and at that time $48,850 of the capital stock was subscribed, and ten per cent. thereon paid. It does not appear that any call has been made; the dependence seems to have been wholly or nearly so on the aid of the different municipalities.

Looking at all the circumstances of the present case, I find very grave difficulties. Foremost stands the non-compliance with the express directions of section 10 of the Railway, Act; Consol. Stat. C., ch. 66, as to plans and surveys. The 8th sub-sec. of sec. 10 enacts that until the original map or plan, and book of reference, or the plans and sections of the alterations have been so deposited, the execution of the railway, or of the part thereof affected by the alterations, as the case may be, shall not be proceeded with.

I do not see how this is to be got over. Nearly eighteen months elapsed between the passing of the Act of Incoration and the subscription of a sufficient amount of stock to authorize the election of directors of the company, but they were elected on the 2nd September, 1874. The agreement with the corporation was made on the 24th November, 1874, referring therein especially to the by-law of the county, passed on the 12th December, 1873, and agreeing to begin within one year from the date of passing the by-law, and

the work on the ground was not begun until the 10th December, 1874, and then the 8th sub. sec. of sec. 10, of the General Railway Act was disregarded or overlooked. Whatever the obstacles, there has been an inexcusable delay as the case is presented to us.

And I am not satisfied that the commencement made on the 10th December, 1874, is to be considered as a *bonâ fide* commencement of the work. I am more inclined to think that it was so hurriedly entered upon at last, because they desired to evade any difficulty to arise from time being of the essence of that contract. If they could have got the county debentures, and had subsequently thought it more to their advantage to abandon the little work that appears to have been done, they might have prepared and delivered their plans, surveys, and books of reference as being the first—the original plans required by the Legislature, though not including this work done.

I cannot refrain from the expression of my disappointment at the inconclusive character of the evidence given by the Chief Engineer of the Southern Railway. To tell us it is as well done as it could have been last winter may be perfectly true, and yet the work be very indifferent, and the residue of the affidavit wants that clearness of expression which brings conviction.

I am not free from serious doubt, whether the railway company should not have sought relief (if entitled to it at all) by a proceeding in which they could have claimed a mandamus, but I do not rest my conclusion on any such ground.

I am of opinion the appeal should be dismissed with costs.

BURTON, J.—The inclination of the Courts of late years has been to enlarge the remedy by mandamus, and the objection which at one time existed to granting it if the applicant had any other remedy, is to a very great extent removed by the facility now afforded for the examination of the parties and their witnesses before the Court or the

Judge applied to, and from the fact that a mode now exists of revising the proceedings by appeal, both by this Court and the Supreme Court.

It is laid down in Mr. *High's* valuable work, that the object of a mandamus being to enforce specific relief, it follows that it is the inadequacy rather than the absence of other legal remedies, coupled with the danger of a failure of justice, without the aid of a mandamus, which must usually determine the propriety of this species of relief.

It is difficult to conceive in what form an action at law could be framed, and assuming it to be maintainable, what damages would be recoverable in an action by the railway against the corporation or the warden for the breach of duty which is here alleged. But it is manifest that if any such remedy is open, it is not an adequate remedy, and on that ground I should be inclined to think the application a proper one.

The existence of possible equitable remedies does not affect the jurisdiction of Courts of law in attaining the same end by writ of mandamus, and the Act of 1873 was intended to do away with the old system of driving a suitor from one Court to seek redress in another, where, perhaps, he might again be met with the objection, that he should seek his remedy in the Court which had already declined to hear him.

The language of that Act is, that the Courts of law and equity shall be as far as possible auxiliary to one another respectively, for the more speedy, convenient, and inexpensive administration of justice *in every case*.

I think, therefore, that as the applicants have selected a common law Court as the forum to adjudicate upon the questions in dispute, they should be entitled to succeed if they have disclosed a case which would entitle them to relief in a Court of equity.

Whether they are entitled to any relief is a more difficult and serious question, one involving grave consequences, whichever way it may be decided, as it is quite clear that a refusal of the writ leaves the company without

any remedy, whilst it was strongly, and not without apparent reason, urged that the expenditure of this large amount would be insufficient, with the other means of the company, to complete the road, and thus leave the ratepayers exposed to taxation for no equivalent benefit.

With great deference, however, to Mr. Justice Wilson, I think it is not our province to pronounce any opinion or to be influenced in our judgment by our individual views of the Act of Parliament incorporating this Company, nor by the financial position of the company.

The Legislature has wisely or unwisely adopted a policy under which the ratepayers, who are the parties mainly benefited by the construction of local railways, are empowered to assist in building them either by becoming shareholders in the undertaking, and thus, to a great extent, controlling its management, or by granting donations to them, in which event, under this Act, they also have a representative at the board of directors.

It is not to be expected that capitalists would invest money in the stock of such undertakings, and if built at all they must be so built to a great extent by the ratepayers, with such assistance as they can obtain from the Government, and such sums as, with these expenditures as a basis, they can borrow on the undertaking itself.

I attach, therefore, little or no importance to the fact frequently referred to during the argument, that only a comparatively small amount had been subscribed by private stockholders. In truth these stockholders are each in effect granting a bonus to the railway far exceeding in amount that given by the individual ratepayers who are not stockholders.

It may be a matter for the consideration of the Legislature, whether a more perfect machinery and additional safeguards and conditions may not be devised for the protection of the municipalities, and for securing the objects sought to be attained, but we have to deal with the facts as we find them.

No doubt the objections now raised were urged upon the

ratepayers by the parties opposed to the by-law, before they voted upon it, and it was competent to them to have rejected it, and for the council, when insisting on an agreement, to have provided that the debentures should not be delivered to the trustees until a certain amount of subscriptions, municipal or private, had been obtained; but it does not seem to me, as at present advised, that it should be in the power of a few members of the council, possibly opponents of the undertaking, to frustrate the wishes of the majority of the ratepayers, and refuse to hand over the debentures, if the conditions on which they were to be delivered have been complied with, especially when we find that the Legislature has made it compulsory upon the council, in the event of the by-law being approved of by a majority of the ratepayers, to read the same a third time, and pass it within a month, and within three months to issue the debentures.

The warden now states as one of his objections to the delivery of the debentures, that such an agreement as the by-law requires has not been delivered. In his letter of the 19th April, 1875, he merely says that the bond is not in the hands of those officers of the council who are the custodians of such papers, and that he has never seen it, not denying that it had been delivered. In point of fact an agreement had been delivered to the former warden in the terms of the by-law, and is, I think, substantially in compliance with its requirements. And as regards the use of the word "expense," no money can be paid out except upon the certificate of the engineer that a certain sum has been expended, in construction of mile No.— specifying the mile on which it has been expended.

I cannot conceive that when the Legislature left the decision of this question to the ratepayers to be decided at the polls, and upon their approval of the by-law made it compulsory upon the council to pass it and issue the debentures it was intended to leave it in the discretion of one or two of the members of that council to defeat their wishes, on the ground that in their opinion the financial

standing of the company was not satisfactory. I do not for a moment doubt that these gentlemen were sincere in doing what they believed to be their duty, but I think they have mistaken their powers, and that it is not discretionary with the warden, if the conditions have been complied with, to withhold the debentures. It would be of little use to leave the decision of such questions to the ratepayers if their decision could be defeated by one or two dissentients in the council; and from the evidence it would seem that there were opposing interests—the south part of the county, which had obtained its railway (the Woodstock & Port Dover) being opposed to the issue of the debentures in aid of the other line.

I think, therefore, this question resolves itself into whether there was an actual commencement of the work as stipulated for in the agreement.

It was urged, and Mr. Justice Wilson in his judgment adopts the view, that under the 8th sub-sec. of sec. 10 of the Railway Act the works of the railway could not be proceeded with until the deposit of the maps and plans. I have always supposed that the principal, if not the sole object, of these sections which refer to the deposit of the plans and books of reference was, that the rights of individuals in their lands, and the rights of the public in the highways, might be protected and secured, and I have never for a moment doubted that, until the provisions of these sections were fully complied with, the company could not exercise their compulsory power, and any attempt to cross the highway would subject them to indictment, but that notwithstanding the apparent prohibition contained in this sub-section the company, under their general powers, could proceed to construct a railway upon their own land or upon any they might acquire by purchase or otherwise than compulsorily. As Mr. Justice Wilson considers the law clearly to prohibit any work, an opinion in which the learned Chief Justice of this Court agrees, I assume that I have been mistaken in this view, but it does not appear to me very material whether they were warranted in law in doing what they did. The

question is whether the work which has been in fact done has been done *bonâ fide* in the prosecution of the work of the railway. It should not be presumed that the company have recklessly and intentionally done work, upon which payments to the extent of $800 or $1,000 have been made, otherwise than on the line of the road which had been surveyed and adopted. But it is sworn by Mr. *Fuller*, "That the survey from Milverton to Stratford was adopted just before it was let out for contract. Profiles and plans of the same were made, and after map adopted they entered into agreement for right of way."

Mr. *Wright*, the engineer of the road, swears that the portion of the line of the railway on which work has been done, is on the route surveyed and finally adopted, and that there is no intention of, or necessity for changing the route of the said railway where work has been done.

The agreement does not say that the work shall be commenced and continuously proceeded with till completion, but that it shall be commenced.

In addition to the affidavits of the contractor and engineer, there is the affidavit of the President, the Vice-President, and several directors, that the work was *bonâ fide* commenced, with the intention of prosecuting it without delay or suspension until the completion, and that it was so continued until, in consequence of the refusal of the county to deliver the debentures, they were forced to suspend.

The engineer of the Canada Southern also swears that the work appeared to him to have been a *bonâ fide* and substantial commencement of the work.

In the face of this evidence it is impossible, I think, to say that the terms of the agreement have not been complied with by a commencement of the work.

The deputy reeve of Mornington makes an affidavit that in conversation with the President, Vice-President, and one of the directors, they intimated that the work was commenced with the view of enabling them to claim the debentures. I see no reason to doubt that statement, nor

do I see how it militates against the claim of the company. Admittedly, they would have had no claims if they had not commenced before the 12th of December, but whether it was one day or six days before, is for this purpose quite immaterial.

Had the company tendered the agreement at the expiration of six days from the passing of the by-law, they would have been entitled to claim the debentures without turning a sod. Why they should be in a worse position when, within the time agreed, they have commenced work and actually expended $800, it is not easy to see. Their financial standing was no worse in December than it was in June. It may be an improvident bargain on the part of the county—upon that I express no opinion. The discretion we have to exercise is a judicial discretion; and if we are satisfied that the condition imposed upon the company has been fulfilled, I think the writ should issue.

For my part I am not prepared to discredit the gentlemen who have made these affidavits, and I come therefore to the conclusion that there was a commencement of work upon the line within the stipulated time. If the law is wrong the Legislature can interfere, but municipalities, as well as individuals, should not be allowed lightly to evade engagements into which they have entered, and upon the faith of which other engagements may have been made.

I am of opinion that the order originally made by Mr. Justice Morrison was right.

PATTERSON J.—The Special Act 36 Vic. ch. 87, incorporates all the provisions of the Railway Act, Consol. Stat. C., ch. 66, except the sections following section 127, which apply to all railways without being incorporated by the Special Act.

The Special Act gives very large powers to municipalities in the way of granting bonuses to the company.

The by-law of the county council under which the questions now arise authorizes the issue of debentures to the amount of $80,000, which are to be delivered by the warden to

trustees appointed under the Special Act, within six months after the passing of the by-law; the by-law, however, being made subject to a condition that the warden shall not deliver the debentures until the railway company shall have agreed under its corporate seal *(inter alia)* that the portions of the railway within the county of Perth shall be commenced within one year and completed within three years from the passing of the by-law. The by-law was passed on 12th December, 1873. The six months within which the debentures were to have been delivered expired before stock was subscribed to an amount sufficient to enable the company to be formally organized, and it was not till September, 1874, that directors could be elected.

The history of this company, shewn by its Special Act and the materials before us, illustrates the divergence which has taken place between the practical promotion and the legislative recognition of railway enterprises.

The General Act remains in force, and is applied to this railway. It is conceived on the idea, which once may have had a basis of truth, that the building and making of a railway was mainly a commercial enterprise in which money was invested with a view to mercantile profit, and which should therefore be managed and controlled by those whose interests were at stake, but which was of sufficient importance to the interests of the public to warrant the granting of large powers and privileges.

The commercial character of the enterprise seems now to have ceased, and the undertaking relies for success, not upon subscriptions of stock, but upon the contributions of money by municipalities, by way of bonus or gift.

I find no fault with this. I am not offering any opinion on the policy or principle involved. It is not my province to do so, or even to form any opinion on the subject. I do not dispute that the public interest may be best served by the railway being built by public moneys. I allude to the matter only for the purpose of pointing out that the attempt to work the new system under the old legislation gives a fictitious character to what is still called a railway

company; gives room for such anomalies as a company without stockholders—an aggregate without units—and as, in this instance, the somewhat fantastic spectacle of an authorized capital of $50,000 for the construction of a hundred miles of railway, with all the statutory powers and provisions gravely awarded to the company so constituted, as if the stockholders were the real owners of the undertaking and were controlling the management of their own capital.

I repeat that I am not finding fault with these things as they are, and I do not suggest that any better way can be devised for the promotion and execution of these very important works; but we cannot be surprised if, in the attempt to work the new system under the old rules, practical difficulties arise. We must, however, deal with the law as it is; and as in these times there is not much reluctance on the part of the Legislature to change the laws when circumstances seem to call for change, there is no longer any necessity, nor would it be proper to attempt by judicial construction, to modify any express enactment in order to adapt it to a supposed exigency.

In the case before us, the application for mandamus is resisted on the ground, amongst others, that within the six months mentioned in the by-law, the agreement which was to be executed as a condition precedent to the company's right to the debentures had not been executed; and that if the execution of the agreement at a later date would still entitle the company to the debentures, yet the agreement has in fact been broken by failure to commence the road within the year.

The agreement appears to have been handed to the warden and the debentures demanded on 7th of December, 1873, five days before the end of the year from the passing of the by-law, within which the work was to have been commenced.

Work was commenced by a contractor on the 10th of December but no map or plan and book of reference were filed in pursuance of the Railway Act, and, as far as appears, none are yet filed.

It may be that the failure to file the plans arose in some way from the difficulty surrounding a company formed under the anomalous circumstances to which I have alluded; but we have to deal merely with the fact that they were not filed, and with the legal result of the omission.

Section 10 of the Act requires the filing of the documents, and sub-section 8 enacts that "until such original map or plan and book of reference, or the plans and sections of the alterations have been so deposited, the execution of the railway, or of the part thereof affected by the alterations, as the case may be, shall not be proceeded with."

It is argued that this enactment relates only to the compulsory powers of the company as to taking lands, &c., and only suspends the exercise of those powers until compliance with sub-section 8; and it is urged that the work done was done on lands which the owners had agreed to convey to the company, and so the omission is unimportant.

The argument from the fact of the work being done by the consent of the land owners, is well answered by Mr. Justice Wilson in his judgment in the Court below, by shewing that these lands may be abandoned and the road placed elsewhere; to which I may add that, looking at the agreements, it is by no means certain that they are binding or can be made to refer to the lands occupied, except by the deposit of a plan, &c., which will set out and ascertain these same pieces of land. The agreements do not describe the land otherwise than as "the land required by the company for the right of way for their railway across lot" so and so. There is strong ground for contending that land cannot as a matter of description, be identified as "land required for the right of way" until it is ascertained, as section 10, sub-section 1 requires. I understand sub-section 2 of section 11 to bear this out. It provides that an agreement made before the deposit of the map or plan, and before the setting out and ascertaining of the lands required for the railway, shall be binding at the price agreed upon for the same lands, if they are afterwards so set out and ascer-

tained within a year from the date of the agreement, although the land may, in the meantime, have become the property of a third party.

I do not rest my judgment on this point.

I see no ground for adding, as we are asked to do, to the terms of sub-section 8, another term limiting its plain meaning.

There is not an expression in it indicating that it is to be read only with reference to the powers of taking lands; and it is not even placed in the division of the statute which relates to those powers.

The plain enactment is, that the execution of the railway shall not be commenced until a certain act is done.

The company cannot be heard to say that they have not done the act, and yet have commenced the execution of the railway.

It must therefore, in my judgment, be held that the railway was not commenced within the county of Perth within the time stipulated for in the by-law and covenanted in the agreement; and that the company having failed in their part of the contract, the mandamus was properly refused.

I do not discuss the other grounds on which the judgments delivered in the Court below proceeded, as I agree in the result.

I have already said that I see no ground on which, as a matter of construction, we could read sub-section 8 as meaning anything but what it says: but even if the enactment was open to any liberality of construction, I should doubt the propriety of endeavouring to relax the direct effect of its provisions in favor of this railway company; because it seems to me very plain that the ratepayers of the municipalities are entitled to whatever protection they can receive by means of the strict reading by the Courts of both by-laws and statutes, as it is evident that the Legislature has not hesitated to deprive them, by Acts passed at

the instance of this company, of much of the protection which the general law would afford.

The by-law in question provided for giving a bonus to each of two companies. The ratepayers opposed to the bonus in either case, and who may have seen the by-law carried by means of this combination of interests, and have relied on asserting before the Courts the invalidity of the by-law, had that resource cut off by the statute 37 Vic. ch. 58, which confirmed the by-law.

They had, however, the terms of the by-law still to resort to as securing to them, at all events, that their money should be expended and the road begun and finished in their county within the time mentioned. That was a condition of the by-law itself, and no other by-law could be passed affecting it without their having an opportunity to vote on it; and when the year elapsed without the railway being commenced, as it did on 12th of December, 1874, the ratepayers had a right to know and rely on the law which, by the very terms of the by-law itself, defeated the grant.

But on the 21st of December another statute received Royal Assent, 38 Vic. ch. 55, by section 8 of which the council has power, without any reference to the ratepayers, to annul the condition on which the ratepayers voted the by-law, by extending the time for the commencement and completion of the work, whether the time shall have elapsed before the extension or not.

This same statute contains two other sections which do not tend to shew that the opinion formed and expresed by the learned Judges in the Court below against the good faith of the alleged commencement of the work, were unwarranted. One is section 2, which confirms the election of directors on 2nd September, 1874, suggesting that when those directors assumed to let the contract, execute the agreement, and demand the debentures, they may have had no legal power to do so. The other is section 11, which contains the rather startling enactment that "Notwithstanding the lapse of any time limited by the Special Act for

commencing and completing the said railway, or *by this Act*, for commencing and completing the said railway, the *said Acts* shall continue in force, and any by-laws granting aid shall continue in force." And then the clause, rather unnecessarily after this sweeping provision, extends the times to six months and seven years from the passing of this Act.

The time for commencing the road was limited by the original Act to two years, which expired on 29th of March, 1875. The commencement relied on before us is placed on 10th of December, 1874. The company do not rely on this to save their charter, but procure the further extension, which would have been unnecessary, so far as the time for commencement was concerned, if the road had already been commenced. In view of the apparent facility for procuring legislation of this character I think I am justified in saying that the need for such protection, if any, as the Courts can extend, seems to be rather on the side of the ratepayer than of the railway company.

I am of opinion that the appeal must be dismissed.

Moss, J.—I fully sympathize with the opening remarks in the judgment of Wilson, J., respecting the difficulty of dealing with cases of this description. It is impossible not to feel the justness and appropriateness of his observation, that to refrain from enforcing the bonus may seem like a breach of faith to the railway company, which has entered on a great enterprise, and assumed heavy responsibilities, and whose work may be frustrated without the promised aid; while to compel payment of the bonus may be a loss to the ratepayers, who may get nothing for the money they granted only for an equivalent.

This difficulty has not been lessened by the apparent reluctance of the Courts to define with precision the principles which should guide their course upon such applications.

It is commonly said that the granting or withholding of this high prerogative writ is a matter for the discretion

of the Court. But I apprehend that this discretion—at least in cases resembling that now under review—should be exercised according to some fixed and general rules.

There is no sound reason for leaving discretion in such cases to be exercised on arbitrary principles, or according to the ideas of natural justice of the particular Judge or Court.

There is no just cause why, upon an application for a *mandamus*, the door should be opened to the inconveniences which attend *jus vagum et incertum*. I should not think it cause of wonder, that the most patriotic of suitors failed to recognize the perfection of reason in the law of his country, if he was refused a manifestly efficacious remedy upon the ground that the Court was not satisfied that he could not obtain redress by the ordinary forms of legal proceedure.

The idea that a peculiarly wide field for the exercise of judicial discretion was opened upon an application for the writ of *mandamus* was no doubt founded upon its original prerogative character. While it was deemed an emanation from the sovereign as the fountain of justice, who was in legal fiction still personally presiding *in curiâ*, this theory was natural and intelligible. The Court was expressing the will of the sovereign, and exercising one of his attributes, rather than administering the general law, to which every subject was entitled to appeal as of right. But, in my opinion, the writ is not invested with any prerogative character in this Province. It is not attached to any particular Court, but may issue out of either of the superior Courts of common law.

A system of procedure has been prescribed by statute: 35 Vic., ch. 14, O. The writ may be awarded by a single Judge, either in term time or in vacation. Affidavits may be used in the same manner and according to the same practice as in Chamber applications. Persons who are unwilling to depose to affidavits may be compelled to attend for oral examination, and their evidence reduced to writing. The order made by the Judge is subject to a series of appeals, by which the decision of the Supreme Court of the Dominion can ultimately be obtained.

These considerations, and especially the great latitude of appeal, seem to me to shew that the discretion which the Court should exercise is not one founded upon its notions of what would accord with natural justice, or harmonize with the requirements of a perfect system of ethics in the particular case, but that sound judicial discretion which acts upon well defined rules of general application.

It will hardly suffice to say that this remedy is to be granted or withheld *secundum discretionem boni viri*, unless appellate Judges are to be deemed gifted with superior goodness. I think that in this case, as suggested by Sir Joseph Jekyll, with reference to the jurisdiction of Chancery, we must go further and ask the question: *Vir bonus est quis?* And I see no objection to the answer given of old: *Qui consulta patrum, qui leges juraque servat.*

It is true that in the preamble to the Act, 35 Vic. ch. 14, the writ is termed "The Prerogative Writ of Mandamus," and the avowed object of the enactment is to prevent the injustice done in many cases by the delay in its issue, and to devise a more speedy and summary method for the issue of the *same;* but it would be giving extraordinary force to the use of this appellation for the writ in the preamble to make it countervail the considerations to which I have alluded.

It was an accustomed and familiar description of the writ, which the author of the statute naturally enough employed, and the Legislature adopted, without any possible intention, that its use should influence the question as to what principles should govern judicial action with respect to the writ.

The first section directs "that in all cases in which the Court has jurisdiction to issue the writ of peremptory mandamus, it shall be the duty of the Judge, provided he be of the opinion that the case is a proper one for the issue of the same," to make an order for its issue. Now it is conceded that this provision did not enlarge the circle of cases in which the Court had jurisdiction to issue this writ.

It could not be contended that a Judge was given

authority to order the writ in any case in which the Court had not power before that Act to order it; but the question I am now discussing is not one of jurisdiction. It concerns only the principles upon which the jurisdiction should be exercised; and I think that the whole scope of the Act confirms the view which I have already expressed.

The Judge has a positive duty imposed upon him. He must form an opinion whether or not the case is a proper one for the issue of a writ, and the correctness of that opinion may be finally tested in the highest Court of the Dominion.

My own opinion is, that it would be found a safe and convenient rule for a Judge to act upon principles similar to those which govern a Court of Equity in a suit for specific performance. That Court refused to interfere where there was an adequate legal remedy, and while it treated the jurisdiction as discretionary, the exercise of that discretion was limited and controlled by defined and well settled rules. The authorities establish that where there is a clear, adequate, and appropriate legal remedy giving the aggrieved party perfect redress, the writ should not issue, so that this far the analogy is complete between applications for the writ and suits for specific performance, or specific delivery.

I do not overlook the decision in *Benson* v. *Paull*, 6 E. & B. 273, that even under the English statute corresponding to Consol. Stat. U. C., ch. 23, the right to a mandamus does not extend to the fulfilment of duties arising merely from a personal contract, but must be confined to such duties as might have been enforced by the prerogative writ; and that in *Fotherby* v. *Metropolitan R. W. Co.*, L. R. 2 C. P. 188, 195, Byles, J., says that a claim for the writ cannot be added in every action for the breach of a duty, notwithstanding the large words of the statute, for it cannot have been intended that specific performance should be ordered of every personal contract.

It is worthy of note that the learned Judge last named understood Lord Campbell to have been of opinion in

Benson v. *Paull* that an action for mandamus may sometimes lie when the old writ would not have been issued. It is probable that the learned Judge had in his mind the case of *Norris* v. *Irish Land Co.*, 8 E. & B. 512, in which Lord Campbell recedes from the position that the remedy is confined to cases where the performance would before the Act have been enforced by a prerogative writ.

But these authorities are not repugnant to the theory that in cases where jurisdiction does exist, a rule such as I am advocating may well be adopted. In *Fotherby* v. *Metropolitan R. W. Co.*, the decision simply was, that an action under the statute will lie although no actual damage has been sustained. In *Benson* v. *Paull* a demurrer was allowed to a declaration claiming a writ to enforce the execution of a lease in fulfilment of an agreement. The *ratio decidendi* was that the extremely general words used in the Act—"for the fulfilment of any duty in which he is personally interested," could not be applied to contracts at all, for there was no discrimination made by the Legislature as to the species of contracts enforcible, and therefore if it extended to any duties arising from contract it must extend to all, including those which could not be specifically enforced in equity.

Lord Campbell thought that if they were bound to grant the writ for the fulfilment of the duty to perform the contract to execute the lease, they would equally be bound on the application of a lady to order a gentleman to fulfil his duty, and perform a promise which he had made to marry her. But this throws no light upon the opinion which his Lordship might have formed upon the fitness of applying to cases where there was jurisdiction rules analogous to the equitable doctrines.

The reasons which led the Court of King's Bench to assume the right to issue this writ, and the Court of Chancery to assume the right to decree specific performance, were substantially the same. In each case the moving spring was the failure of justice occasioned in particular cases by the inability of the common law to award appropriate relief.

Lord Mansfield states that the writ was introduced to prevent disorder from failure of justice, and that it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one: *Rex* v. *Barker*, 3 Burr. 1265.

No doubt, as the language of Lord Mansfield suggests, the class of cases in which it was originally resorted to, was narrow, but the want of a specific remedy at common law is the special feature which led to its introduction, and contributed to that development of its scope which may be plainly traced in its history.

Blackstone, vol. 3, 3rd ed. p. 116, says it issues "in all cases where the party has a right to have anything done, and has no other specific means of compelling its performance."

It is interesting to read in this connection the observations of Lord Redesdale in *Harnett* v. *Yielding*, 2 Sch. & L. 549, 552, and compare their resemblance. That great master of the history and practice of the Court of Chancery says, that unquestionably the original foundation of the jurisdiction exercised in decreeing specific performance was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed.

Originated as these two branches of jurisdiction were, to supply similar defects in the ordinary administration of the jurisprudence of the country, it would seem fitting to pay regard to the rules of equity,—at least in cases where there is a convenient remedy in equity. Especially must this be appropriate, since the decision can be reviewed. Take the present application as an illustration.

It will not be doubted that a suit in equity might have been instituted to compel the delivery of these debentures. From a decree of the Court of Chancery an appeal might have been brought to this Court and ultimately to the Supreme Court.

It surely would be opposed to the whole spirit of recent legislative efforts to give a party the complete redress to

which he may be entitled, without driving him into another Court, if it could be contended with success that the decision in appeal should depend upon the forum in which proceedings were initiated. There is no reason to suppose that the materials before this Court would be at all different if the appeal were from a decree.

It was not suggested that any further or other evidence could have been presented if the controversy had been conducted according to the forms of equity proceedure, and, indeed, so far as written evidence goes, the machinery for taking it at the instance of either party provided by the Act is just as effective as that of Chancery.

I have dwelt upon this point because I venture to think that some of the arguments pressed upon the Court, and to which some weight seems to be given, are based upon considerations of too vague and general a character to form a safe or satisfactory foundation for judicial action.

I must, with great respect, express my dissent from the view to which the learned Chief Justice of the Queen's Bench has lent the weight of his high authority. He says, "if the county are bound to hand over the debentures and refuse to do so, the railway company have a remedy either at law or in equity." It seems to be conceded that the company might have proceeded in equity, but I am utterly unable to conceive what adequate remedy is open to them at law, if this writ be refused. The learned counsel for the corporation could not suggest any form of declaration that would suit the justice of the case, or give the company substantial compensation even by way of damages. But the authorities clearly establish that a mere right of the applicant to recover some damages by the ordinary form of legal proceedings is no bar to the issue of the writ.

Regina v. *Hull and Selby R. W. Co.*, 6 Q. B. 70, is authority for the proposition that a mandamus may be issued against a party for a matter in respect of which he is liable to an action.

In *Regina* v. *Southampton*, 1 B. & S. 5, 22, Crompton, J., said, "We constantly grant a mandamus against railway

companies in cases where an action would lie against them."

There are numerous other authorities which seem to me to place this point beyond controversy. There must be a specific legal remedy adequate to secure the right and enforce the performance of the duty.

I take it to be not less definitely settled that the remedy must be a legal one, and that the mere circumstance that redress may be obtained in equity is not a sufficient ground for refusing to interfere.

In *Rex* v. *Bishop of Chester*, 1 T. R. 396, 404, Buller, J., pointedly says that the Court will not interpose unless the party making the application has no other specific legal remedy. "It must be a legal and a specific remedy."

In *Rex* v. *St. Katharine Dock Co.*, 4 B. & Ad. 360, 363, Lord Denman remarks: "The first question in this case is, whether a mandamus will lie, and it undoubtedly will if the party has no other *legal* remedy."

In *arguendo*, Sir James Scarlett did not attempt to put his opposition to the writ any higher than that to found it, there must be a specific legal right and a want of specific legal remedy. Similar language was used by Lord Ellenborough in *Rex* v. *Archbishop of Canterbury*, 8 East 213,

In *Wormwell* v. *Hailstone*, 6 Bing. 668, Tindal, C. J., thought that certain funds could be made available either by a mandamus or by a bill in equity.

An eminent American Judge, Nelson, J., in *People* v. *Mayor of New York*, 10 Wend. 395, has observed that the principle which seems to lie at the foundation of applications for this writ and the use of it, is, that whenever a *legal* right exists the party is entitled to a *legal* remedy, and when all others fail the aid of this may be invoked. In the same judgment he explains legal remedy to mean remedy at law, as contradistinguished from the right to equitable relief. He does indeed express the opinion that the right to such redress in Chancery should influence the Court in the exercise of its discretion; but, for reasons which I have already sufficiently indicated, I think it can seldom happen under our system that this consideration should be treated

as weighty. It can only happen, in my opinion, in a case where it is demonstrated that through some superiority in the machinery of equity procedure the truth could be extracted, while upon the application for a mandamus it could not be reached.

I now proceed to endeavour to apply to this case the principles I think should be adopted and acted upon. By the by-law passed by the ratepayers under legislative authority, and possessing for all the purposes we have to consider the force of a legislative enactment, the railway company were entitled to require the delivery of the debentures to the trustees within six months, with a proviso, however, that the warden should not deliver them until the company should have agreed, under its corporate seal, that the amount of the debentures should be wholly expended upon the construction of its line within the limits of the county of Perth, and that the moneys to be realized from them should be advanced in the following manner, namely, 75 per cent. on the engineer's certificates, as the work progressed, and the balance on the completion of the railway; and that the portions of the railway within the county should be commenced within one year and completed within three years from the passing of the by-law. The plain effect of this was not to entitle the company to require delivery until the expiration of six months, and even after that period not until it had entered into an agreement in accordance with the proviso.

After the six months, but within a year, an agreement intended by the railway company, as there is no reason to doubt, to be in compliance with the proviso, was executed and delivered to the warden of the county. There is evidence to shew that this instrument was not, at any rate formally, laid before the council, and did not receive their approval.

This seems somewhat extraordinary, and I cannot help remarking that the evidence does not exclude the surmise that most of the members may have been aware of its existence and contents.

There is no affidavit by Mr Jones, the then warden, to explain the grave omission of duty which seems to be involved in a failure to communicate to the council the receipt of this important document. But this point does not appear sufficiently important to lead me to consider the suggestions which were offered to account for this conduct, because I would now be prepared to give effect to any exceptions that might be taken to this instrument.

It has been objected in the affidavits filed by the corporation, and upon argument, that it does not conform to the terms of the by-law. That objection was elaborately considered by Wilson, J., and he arrived at the conclusion that the instrument was sufficient to entitle the corporation to restrain the council from applying the proceeds of the debentures to any other purpose than that of construction.

In that interpretation of the instrument I entirely concur, and it establishes that it was a sufficient compliance with the proviso. Contemporaneously with the delivery of this agreement, a proper demand was made for the debentures. This, however, was not done until the 7th of December, 1874, five days before the expiration of the year, but as the appointment of a trustee by the Lieutenant-Governor was not notified to the company, until the 3rd of December, a much earlier application would have been futile. Upon the delivery of this agreement, a strict legal right to the delivery of the debentures became vested in the company.

But the application to the Court not having been made until after the expiration of the year, during which something was stipulated by the agreement to be done, namely, the portion of the railway within the county to be commenced, it would be inequitable now to order the delivery of the debentures, merely because the piece of paper had been handed to the corporation, if in truth there had been a substantial failure to comply with its provisions. I think that the failure must be shewn to be of a substantial character, and on strict principle. I strongly incline to the opinion that it ought to be one for which adequate

compensation could not be obtained under the agreement. That was the security for the enforcement of their rights and interests, which the ratepayers were willing to accept; and there could be no special hardship that I can discover in compelling the performance of their part of the compact, and leaving them to resort to what they had chosen for their protection. This would not seem unjust when full redress could be obtained for the consequences of default by proceedings either at law or in equity upon the covenants.

Assuming the company to have been organized and trustees to have been appointed immediately after the expiration of the six months, if the agreement had then been delivered and the debentures demanded, the corporation would clearly have been bound to hand them over, and could only seek a remedy for non-performance of the company's engagements upon the agreement. Why should they now be in a better position on account of any default, which has caused no damage, or damage admitting of adequate compensation?

The corporation's reasons and excuses for not delivering the debentures are summarized in the affidavit of Mr. Davidson, the warden for the year 1875. With that founded upon the alleged insufficiency of the instrument delivered by the company I have already dealt. Another is couched in the following terms: "The said company have been unable, although requested so to do, to shew to the said county council such a financial status as ought to justify them in carrying on the construction of the said railway, or said council in delivering the said debentures, and is hereby in my opinion, and in the opinion of the majority of the said council imperilling the money of the ratepayers of the said county." But for the respect due to the opinions of the eminent Judges who entertain a different view, I should have unhesitatingly pronounced this objection utterly groundless. Even in the face of these opinions I must express my own conviction that it is untenable, and furnishes no answer to this application. Who, it may be

asked, constituted the majority of the council a tribunal to pass judgment upon the financial status of the company? If it is proper to attach any weight to their opinion upon this point, it would not be improper to consider the suggestions that have been made with regard to the motives by which this majority were influenced; and I think it will be admitted that that would be rather a wide field for judicial enquiry.

In the Court below it was said: "The county has dealt liberally with the Port Dover line. There is no doubt the county will deal as liberally with this company, if the company can only be persuaded to comprehend the difficult lesson in matters of this kind for any railway company to learn, that they have duties to perform towards others as well as rights to be preserved for themselves." With profound deference for the able and experienced Judge who used this language, I must say that I think it is treading upon extremely dangerous ground to allow such a consideration to be introduced as an element in a case of this character.

The Port Dover line, referred to, was to receive a benefit under the same by-law. It was a line in which the southern portion of the county was peculiarly interested, while the railway now in question would be run directly to the advantage of the northern portion.

This by-law was afterwards thought to require legislative ratification, because the two bonuses were combined, and this was obtained.

The Port Dover line has received its subsidy, and that to the northerly line is now repudiated.

Is it not conceivable, as was asserted before us, that a by-law for aid from the whole county could not have been passed in favour of the Port Dover line without the northern line being included; and that the curing Act could not have been obtained but for the co-operation of those interested in the latter; and that the majority of the council, being eager only for the construction of the former, and indifferent or opposed to the construction of the latter

and having got all they want, are now unfairly intercepting the aid which the ratepayers of the whole county intended to afford to the latter as well as the former?

Surely these suggestions ought to warn us against the danger of permitting such considerations to affect a solemn adjudication upon rights of great magnitude. I may confess that I do not myself perceive that the company has shewn the possession or the prospect of obtaining sufficient funds to complete their project, even if supplemented by this aid; but I think that it is not for me to enter upon an inquisitorial investigation of their present means or their future prospects. The ratepayers had the opportunity of ascertaining, and must be taken to have known and to have exercised their judgment upon the probabilities of the case. It was for them to decide whether the capital required to be subscribed, the municipal and government subsidies that might be reasonably expected, the loans that might be raised on bonds, and any other modes of obtaining money that might be accessible to the company, were sufficient to secure the carrying out of the enterprise.

By the passing of the by-law in its existing form this opinion was authoritatively declared. They did not choose to exact any further or future statement, nor did they empower their council—much less a majority, it may be a bare majority—to revise their action, or to pronounce that their interests would be imperilled by giving effect to their by-law.

A further objection is thus stated by the warden: "The said company have not, in my opinion, *bonâ fide* commenced the construction of the said railway within the time limited by the said by-law—that is to say, within one year from the 12th day of December, 1873—what they have done appearing to be merely a colourable compliance with the said by-law, as work is only stated to have been commenced on the said railway three days before the said 12th day of December, and continued for a very short time after the January meeting of the said county council in 1875."

In my opinion the cessation of work should not operate

to the prejudice of the company, for it is plain that they then had the best reason to apprehend that the majority of the council would oppose the delivery of the debentures; and as confessedly, the prosecution of the enterprise is dependent upon their receipt, it would have been mere folly to have continued an expenditure of money until this difficulty was settled.

Upon the question of the character of the work actually done, evidence was adduced, with the view of proving that there was no *bonâ fide* commencement within the year. The quantity was but small, the whole amount paid being only a little more than $800. Contracts were entered into for the purchase of rights of way over a few lots, on which the work was done, but no deed was obtained nor any part of the purchase money paid. A contract was made with one Canty for the construction of the portion of the road between Stratford and Milverton within the limits of the county, but it contained a provision towards which much observation has been directed, that the company should have power to suspend the work at any time, and that there should be no liability for damages on account of suspension or delay. None of these things were done until a very few days before the expiration of the year. I think that the fair result of the evidence is, that the company performed these various acts for the purpose of making a commencement within the year, and of avoiding any prejudice or injurious consequence that might arise from nothing having been done before its expiration. But they were only bound to make a commencement *bonâ fide*, not to do any large or even a very substantial amount of work. A mere colourable commencement, *ex. gr.*, the turning of a sod, would not be a fulfilment of their obligation, but the doing of some work (even if small in quantity) with the honest intention that it should form part of the undertaking, and that the construction should proceed with reasonable diligence, would in my opinion suffice.

I cannot conclude from the evidence, and in view of the positive testimony of reputable and competent witnesses that

the company had no design of proceeding, but merely desired to obtain the delivery of the debentures. It is distinctly, and I think incontestably proved, that the subject of suspending the work was never discussed by the directors until after the January session of the council, when they were informed that the council and warden declined to hand the debentures over to the trustees. The president of the company, a gentleman of high standing in the community, and several directors have pointedly sworn that the contract was entered into on the part of the directors *bonâ fide*, and with the intention of prosecuting the work thereunder without delay or suspension until its completion. The much criticized clause in that contract, exempting the company from damages for suspension or delay, does not appear to me to bear the suspicious character with which it has been invested.

I think it was no more than a reasonable and prudent precaution on the part of the directors who from their own shrewdness, or from the abundant lessons furnished by the experience of others, may have already detected the symptoms and anticipated the appearance of just such obstacles as have now been raised by the corporation.

I have already expressed my opinion that the work was commenced when it was, and the contracts for purchase of small parts of the right of way made as they were, simply to begin construction during the year, but I decline to conjecture in opposition to direct testimony that the expenditure was to be thrown away, or that the contracts for purchase were not intended to be acted upon.

There remains the objection that an original map or plan and a book of reference has not been deposited in accordance with the requirements of section 10 of the Railway Act.

Sub-section 8 enacts that until such original map or plan, and book of reference have been so deposited, the execution of the railway shall not be proceeded with. As a matter of fact, the company had not deposited any such plan or book, and it has been held that this is an insurmountable bar to their application.

The ground taken, as I understand it, is that as they could not lawfully commence work until this deposit was made, therefore any commencement actually made should not be treated as a performance of their agreement.. The language used in the sub-section is certainly very wide.

No aid to its proper interpretation can be expected from English authority, because there the filing of a plan is an indispensable preliminary to an application for the Special Act.

In American cases it is laid down that at least the primary and principal object of such an enactment is to prevent the company from exercising its compulsory powers of expropriating lands until the filing of the plan.

I am not satisfied, having regard to the whole scope and object of these provisions, that the true construction may not be simply that their extraordinary powers shall not be used until the deposit has been made. I can perceive difficulties in the way of this construction, and it is easy to see numerous and grave inconveniences, without counterbalancing advantages, in a construction which absolutely prohibits any work upon the railway, until a full plan and book have been deposited.

But granting that, upon the strict letter of the statute, the company could not lawfully proceed with the execution of their railway (whatever that may exactly mean), I am of opinion that the objection does not destroy the company's demand. They had in fact performed work of construction on lands, for the purchase of which they had contracted. They could lawfully make such contracts of purchase before the deposit: sec. 11, sub-sec. 2, and these contracts would stand in the place of awards made where the compulsory powers were invoked. The contracts actually made were for the acquisition of the land of the vendors required for the railway, and were within the statute. The owners could not object to their doing work upon these lands, or afterwards refuse to convey the portions upon which the work had been done. Why should this corporation be heard to offer a contention, which these

proprietors could not advance ? Surely it is time enough to listen to this objection on their part, when some practical necessity for making the deposit has arisen.

But I do not rest my opinion that this objection should be disregarded upon this ground alone. I think that the corporation should be required to shew some damage or prejudice before it is made effectual to defeat this by-law and destroy this enterprise. It is to be borne in mind that a strict compliance with the by-law did not require a commencement within the year. Its conditions were satisfied before the expiration of the year, when the agreement was delivered. We are now considering the default of the company as a ground for relieving the corporation from the fulfilment of the letter of their engagement. It seems not unreasonable to require that they should in that view shew some injury they have sustained, instead of relying upon a merely technical defect.

If technicalities are to govern, the company must prevail, for they did within the year all that was required by the strict letter. If the opposite view to that which I have been endeavouring to uphold is pressed to its legitimate end, it would, in my judgment, involve the consequence that no matter what the magnitude or cost of the work done the company would be left remediless, if they had omitted to deposit the plan and books until a day after the year had expired. Any ground of decision, which could lead to such a result, is not consistent with equity, and does not appear to me to be forced upon the Court by any rule of law.

I do not think that a Court of equity would refuse to interfere upon any of the grounds that have been urged on behalf of the respondents. So far as I have been able to follow the current of modern decisions in the English Courts of law, the liberality displayed in the granting of the writ of mandamus would extend to this application.

I must naturally feel a profound distrust of the soundness of my conclusion, opposed as it is to that of other Judges of large experience, and known intimacy with this

branch of the law; but I also felt it to be my duty to express the opinion which I had formed upon the best consideration I could bestow.

I think the appeal should be allowed, the rule of the Court of Queen's Bench discharged, and the order of Mr. Justice Morrison affirmed.

As the Court is equally divided the result is, that the appeal must be dismissed; but we are all of opinion that this is not a proper case for allowing costs.

Appeal dismissed, without costs.

JULIA ELIZABETH BLACKMORE, ADMINISTRATRIX OF LEWIS HARROLD BLACKMORE, DECEASED, v. THE TORONTO STREET RAILWAY COMPANY.

Street R. W. Co.—Accident to newsboy—Right of action—Negligence—Contributory negligence.

The deceased, a boy selling newspapers, got on a street railway car at the rear end, and passed through the car to the front platform, where the driver was standing. He stepped to one side behind the driver, and fell off or disappeared from the car, there being no step on that side, and was killed by the car running over him. He had said just before that he was going on some distance further in the car, and the conductor at the time stated that he had reported the want of a step to the owners of the railway, but it had not been attended to. There was plenty of room in the car, but it was proved that passengers were always allowed to stand on the platform. It was not shewn that the deceased had either paid or been asked for his fare, but it appearad that newsboys were allowed to enter the cars to sell newspapers without being charged.

Held, in the Queen's Bench, that the deceased was lawfully on the car, and being so was entitled to be carried safely, whether he was a passenger for reward or not.

Held, also, MORRISON, J., dissenting, that there was evidence for the jury of negligence on the part of defendants in the absence of the step, and no such contributory negligence on the part of the deceased as should, as a matter of law, prevent the plaintiff's recovery. A nonsuit was therefore set aside.

Upon appeal this decision was reversed, on the ground that unless the deceased was upon the cars as a passenger, on a contract of carriage express or implied, and not as a mere licensee or volunteer, he had no right of action against the defendants for the absence of the step, which was no breach of duty to him, but must take the car as he found it; and that upon the evidence he must be taken to have been a licensee only.

THIS was an action under Consol. Stat. C. ch. 78, by the representative of Lewis Harrold Blackmore, deceased, to recover damages in respect of his death through the alleged negligence of the defendants.

The declaration alleged that the defendants were carriers of passengers upon a street railway from King street in the city of Toronto to the village of Yorkville, a municipality adjoining the limits of the said city, for reward to the defendants; and said L. H. B. in his lifetime, at the defendants' request, was received by them as a passenger, to be safely and securely carried upon the said railway for reward to the defendants; and it thereupon became defendants' duty to use due and proper care and skill in and about keeping the car of the defendants in which the said L. H. B. was so received as a passenger upon the said railway, and the platform and steps of the said car, in a good and safe condition and state of repair, and in and about the carrying the said L. H. B.; yet the defendants did not keep the said car and the said platform and steps in a good and safe condition and state of repair, and did not safely and securely carry the said L. H. B. upon the said railway, and so negligently and unskillfully conducted themselves in that behalf, and in and about the management of the said railway and of the said car, and the said car and the platforms and steps thereof were permitted to be and to remain in such an unsafe condition whilst the said L. H. B. was such passenger, that by means of the mere carelessness, negligence and wrongful conduct of the defendants in that behalf, the said L. H. B. was thrown out of and fell from the said car, and was thereby wounded and injured, and by reason of the wounds and injuries thereby occasioned to him the said L. H. B. afterwards, and within twelve calendar months next before this suit, died; and the plaintiff as administratrix, for the benefit of J. E. B., the mother of the said L. H. B., according to the statute, claims $5000.

The pleas were

1. Denial of the plaintiff being administratrix.

2. Not guilty.

3. Denial that the deceased was a passenger.

The issues were brought down for trial at the January Assizes for Toronto in 1875, before Patterson, J., and a jury.

The deceased was eleven years old. He sold newspapers, and lived with his mother. Two others of her children also sold newspapers. She had no means of support except what her children supplied. The deceased had been two and a-half years selling newspapers. He sold under her direction, and gave all his earnings to her. He had between forty and fifty regular customers. She gave the children money each day to pay for the newspapers. The children made a profit of ten cents on each dozen of newspapers sold. He earned on an average $4 a week. The earnings of the children belonged to her.

He met with his death on the 22nd September, 1874. He got on the car at the same time as another passenger, while the car was on Yonge street, between Carlton and Cruickshank streets, proceeding southerly to King street. The car had a platform in front and another behind. When built there was a step on each side of each platform for the purpose of ascending and descending. Deceased got on the car at the rear platform, and passed through the car to the front platform. When passing through the car he spoke to one of the passengers. He offered newspapers for sale both in the car and on the front platform. The driver was standing on the front platform. The deceased stepped behind the driver and suddenly disappeared. He, in the language of one of the witnesses, "fell off" on the west side of the car, on the right of the driver. There were only four passengers at the time, and one of these was on the front platform.

The intention of the deceased did not seem to be to get off the car when he moved behind the driver, for he told one of the passengers, who was called as a witness, that he was going to King street. His intention appeared to be to stand on the step of the front platform. There

was a fare collected from the passenger who stood beside the driver. There was no evidence that the deceased either was asked for or paid his fare.

Deceased before his fall stepped sideways behind the driver. He did not, according to the testimony of one of the witnesses, turn as if he meant to get off. There was no step to the side of the platform where he fell. The consequence was the fall. It did not appear on the notes at what hour of the day or night the accident occurred, but it was said that had deceased looked before stepping he might have seen there was no step. The conductor at the time said that the want of the step was not his fault, that he had reported the want of the step at Yorkville, and there was no attention paid to his complaint. There was no space for a person to stand in a comfortable position on the right side of the driver without stepping on the step. Just before he fell the deceased asked the passenger who was on the front platform to buy a newspaper. He then moved behind the driver, and instantly fell.

When the deceased fell the car passed over his body. The car was stopped at once. The conductor picked him up. It was not possible to stop the car in time to save the deceased. He then received the injuries of which he shortly afterwards died.

It was proved that passengers are allowed by the conductors at all times to stand on the platforms, whether the cars are crowded or not.

It was also proved that the plaintiff had obtained letters of administration to the goods, chattels, and effects of the deceased, and that he had not at the time of his death any goods, chattels, or effects.

At the close of the case a nonsuit was moved, on the following, among other grounds :—

1. Administration could not be properly granted when there was no property of the deceased.

2. Deceased was not on the car to be carried as a passenger, and as to him there was no duty cast on the defendants.

3. There was contributory negligence shewn, as deceased might have got off at the safe side of the car.

On the first ground of objection, the learned Judge stated his impression to be, that the right of action was assets for the purpose of the administration.

On the second ground, he ruled that there was no evidence, or at most only a scintilla of evidence, of deceased having been received as a passenger.

On the third ground, the learned Judge did not feel disposed at that stage of the case to nonsuit, but intimated that he would probably hold that a passenger who, when there is plenty of room in a car, voluntarily stands on the front platform, or attempts to get off at the front rather than at the rear, can scarcely attribute his accident to the negligence of the carriers.

Counsel for the plaintiff submitted that it was immaterial whether or not deceased was to be carried for reward: that he was rightfully on the car, at all events till his fare was demanded; and that there was no contributory negligence; but in deference to the intimation of the opinion of the Judge, although not acquiescing therein, accepted a nonsuit.

In Easter term, May 20, 1875, *J. K. Kerr* obtained a rule *nisi* calling on the defendants to shew cause why the nonsuit should not be set aside, and a new trial had between the parties, on the ground that there was evidence to go to the jury that L. H. B. was received by the defendants as a passenger to be safely carried on the defendants' railway, and that there was evidence to go to the jury of negligence on the part of the defendants for which they are liable, and to sustain the plaintiff's cause of action on all the grounds necessary to entitle the plaintiff to recover.

In Michaelmas term, November 30, 1875, *Thomas Ferguson* shewed cause. There was no evidence proper for the consideration of the jury that the deceased was received as a passenger. The defect in the car was visible. It is not clear whether the deceased jumped off or was jerked off.

Had he remained on the car till it stopped he would have been safe, and if he desired to get off he should have gone to the rear and got off from the rear instead of at the front.

He referred to *Anderson* v. *Northern R. W. Co.* 25 C. P. 301., and in the Court of Error and Appeal, Ib. 310.

J. K. Kerr contra. The evidence shews that the car stopped to receive passengers, and the deceased came on as and with the passengers: that at all events he was lawfully on the cars till his fare was demanded; and that he afterwards stepped behind the driver, not for the purpose of getting off the car, but for the purpose of standing on the platform, as he had a right to do. He had a right to believe the step was in repair, and he fell because it was out of repair. The broken step was the sole cause of the accident. It appeared from what the conductor said that the defendants had warning of the state of the step, but disregarded the warning. The case, under any circumstances, should have been allowed to go to the jury; and it was not contributory negligence on the part of the deceased to be or stand on the platform, as passengers were ordinarily allowed to stand there.

He referred to *Graham* v. *Toronto Grey & Bruce R. W. Co*, 23 C. P. 541; *Sheerman* v. *Toronto Grey & Bruce R. W. Co.*, 34 U. C. 451; *Alexander* v. *Toronto & Nipissing R. W. Co.*, 33 U. C. R. 474, S. C. in Appeal 35 U. C. R. 453; *Moffatt* v. *Bateman*, L. R. 3 P. C. 115; *Lygo* v. *Newbold*, 9 Ex. 302; *Torpy* v. *Grand Trunk R. W. Co.*, 20 U. C. R. 446; *Cornish* v. *Toronto Street R. W. Co.*, 23 C. P. 355; *Austin* v. *Great Western R. Co.*, L. R. 2 Q. B. 442; *Great Western R. W. Co.* v. *Harrison*, 10 Ex. 376; *Gee* v. *Metropolitan R. W. Co.*, L. R. 8 Q. B. 161; *Shearman and Redfield* on Negligence, 3rd ed., secs. 263, 264, 282, 285; *Wharton* on Negligence, secs. 354, 355, 365, 641.

February 4, 1876. HARRISON, C. J.—This action is brought by the representative of the deceased, to recover damages because of an alleged breach of duty on the part of the defendants towards the deceased.

The first enquiry is, whether on the facts proved at the trial, or the inferences to be fairly drawn from them by a jury, there was any duty such as alleged from the defendants to the deceased.

If there was a duty by reason of contract or otherwise, the plaintiff should not be prevented from recovering merely because the duty or the facts from which it arises are not stated with formal accuracy. See Administration of Justice Act, 36 Vic., ch. 8, secs. 49, 50, O.

The defendants are carriers of passengers. The deceased entered one of their cars with a passenger and apparently as a passenger. He certainly entered the car with the permission of the servants of the defendants. He afterwards, with the like permission, went on the front platform of the car. He was, therefore, as against the defendants, lawfully on the platform. He was on a part of the car where passengers are allowed by the company to stand whether the car is full or not. While on the platform he either jumped or fell. I would infer, and I think a jury might fairly infer, that he fell. If he fell, the cause of his fall was the want of a step to the platform. That want was patent and known to the defendants in time to have repaired it. But they did not repair it. The consequence of his fall was his death.

In *Skinner* v. *London, Brighton & South Coast R. W. Co.*, 5 Ex. 787, under a similar declaration to the present, the question was, whether there was evidence to go to the jury that the plaintiff, at the time of the accident, was a passenger. It appeared that the train in question had been hired of the company by a benefit society for an excursion, the tickets for which were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one. The contention was, that the facts proved did not support the allegation that the plaintiff at the request of the defendants became a passenger, for the contract of the plaintiff was with the benefit society and not with the defendants. The Court was of opinion that there was evidence for the jury.

In *Collett* v. *London & North Western R. W. Co.*, 16 Q. B. 984, where the plaintiff was an officer of the post office department, carried by the defendants under a contract with the postmaster general, and injured while being so carried, on an objection being made that there was no contract between the plaintiff and the defendants, the Court held that the duty did not arise in respect of any contract between the company and the persons conveyed by them, but is one which the law imposes, for as Lord Campbell said, at p. 989, "if they are bound to carry they are bound to carry safely: it is not sufficient for them to bring merely the dead body to the end of the journey."

In *Marshall* v. *The York, Newcastle and Berwick R. W. Co.*, 11 C. B. 655, where the action was for non-delivery of a portmanteau alleged to be the luggage of a passenger carried for reward, and it appeared that the contract was made by the plaintiff's master, on an objection that no contract with the defendants was proved, Jervis, C. J., said, at p. 662, "Upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any *contract* between him and the company, but by reason of *a duty implied by law to carry him safely.*" And Mr. Justice Williams said, at p. 664, "that an action of this sort is in substance not an action of *contract*, but of *tort* against the company as carriers."

This case was afterwards expressly approved as to passengers in *Austin* v. *Great Western R. W. Co.*, L. R 2 Q. B. 442, where Mr. Justice Blackburn said, at p. 445, "It was there laid down that the right which a passenger by railway has to be carried safely, does not depend on his having made a *contract*, but that *the fact of his being a passenger* casts a duty on the company to carry him safely."

In the *Great Northern R. W. Co.* v. *Harrison*, 10 Ex. 376, where the plaintiff was travelling on a ticket given to another and not transferable, the question was, whether at the time of the injury the plaintiff was lawfully in the carriage, and the Court held that if the plaintiff was in the carriage under such circumstances as not to be deemed a

trespasser he was entitled to sue for injuries sustained in the course of the journey.

In *Torpy* v. *Grand Trunk R. W. Co.*, 20 U. C. R. 446, it was held that it was not indispensable to the recovery of the plaintiff that he should have been an ordinary passenger paying his fare out of his own pocket and taking a ticket, and this case has recently been approved in *Graham* v. *Toronto, Grey & Bruce R. W. Co.*, 23 C. P. 541, and followed in *Sheerman* v. *Toronto, Grey & Bruce R. W. Co.*, 34 U. C. R. 451.

In the latter case Mr. Justice Wilson, speaking of the deceased, said, at p. 462, "He was not there (in the car) by fraud, nor as a trespasser, knowingly violating in the use of the car the purpose for which the defendants say it was only to be used * * and he was, therefore, entitled as a matter of duty to be carried safely and securely by the defendants."

In *Martin* v. *The Great Indian Peninsular Co.*, L. R. 3 Ex. 9, where the action was brought by the plaintiff in respect of the loss of some of his baggage carried under a contract with the Government for the carriage of the baggage of the troops, the Court held that the absence of a contract between the plaintiff and the defendants, or the fact of the contract being made between the defendants and somebody else, did not prevent the plaintiff's recovery.

Baron Bramwell said, at p. 14, "The plaintiff says, 'You had my goods in your possession, and you delivered them wrongly, no matter whether wilfully or negligently; either way you did wrong.' The defendants reply, 'I bargained with some one else to carry them.' But how does this furnish an answer? The contract is no concern of the plaintiff's; the act was none the less wrong to him."

Baron Channell, in the same case, said, at p. 14, "The eleventh plea, which is identical with the tenth, is no answer to the second count, which is not to be considered as charging a mere breach of contract by non-performance, but as charging something done by the defendants in the nature of an affirmative act, *injurious to the plaintiff's property.*"

I take the result of the English and our own authorities to be, that the fact of a man being carried, or of a man's goods being carried, so long as the carriage is not unlawful raises a duty, independently of express contract, on the part of the carriers, in respect of person or property, to use reasonable care and diligence in and about the carriage, and that where person or property so being carried is injured for the want of reasonable care and diligence, an action lies in respect of the injury.

The United States authorities are on this point in accord with the English and our own authorities.

In the *Philadelphia and Reading R. W. Co.* v. *Derby*, 14 How. 468—where the plaintiff, though riding on the invitation of the president of the company, paying no fare and not in the usual passenger cars, was held by the Supreme Court of the United States, the highest Court in the Union entitled to recover in respect of an injury arising out of a collision. Mr. Justice Greer, in delivering the judgment of the Court said, at p. 484, "The liability of the defendants below, for the negligent and injurious act of their servant, is not necessarily founded on any contract or privity between the parties * * If the plaintiff was lawfully on the road at the time of the collision, the Court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover." See further *Shearman & Redfield* on Negligence, 3rd ed., sec. 263; *Wharton* on Negligence, sec. 354.

It is possible for the carriers whether of goods or passengers by express contract to reduce their liability or exempt themselves from liability, so that the goods shall be to a great degree at the risk of the owner or the person travelling shall travel entirely at his own risk. See *Hamilton* v. *Grand Trunk R. W. Co.*, 23 U. C. R. 600; *Alexander* v. *Toronto & Nipissing R. W. Co.*, 33 U. C. R., 474 S. C. in Appeal, 35 U. C. R. 453; *Zunz* v. *South Eastern Coast R. W. Co.*, L. R. 4 Q. B. 539; *Gallin* v. *The London & North Western R. W. Co.*, L. R. 10 Q. B. 212; *Poucher* v. *The New York Central R. W. Co.*, 10 Am. 364; *Lockwood* v. *New*

York Central R. W. Co., Ib., 366, notes ; *Steers* v. *The Liverpool, New York and Philadelphia Steamship Co.*, 15 Am. 453 ; *Henderson* v. *Stevenson*, 1 Sess. cases, 4th series, 215, 15 Am. 457, note ; *Eaton* v. *The Delaware, Lackawanna, & Western R. W. Co.*, 15 Am. 513.

I think, on the authority of the cases to which I have already referred, that there was reasonable evidence to go to the jury in support of the allegation that the deceased was a passenger. But this is not of much consequence, because he was lawfully on the car, and while lawfully there was entitled to be carried safely and securely in the qualified sense that these terms are now understood as applied to carriers. See *Ross* v. *Hill*, 2 C. B. 877 ; and also per Blackburn, J., in *Gee* v. *Metropolitan R. W. Co.*, L. R. 8 Q. B. 161, 166.

There being the duty the next enquiry is, whether there was evidence of the breach of the duty. This was scarcely disputed at the argument. If it is the duty of carriers to use reasonable care in and about the carriage, it follows that it is their duty to use reasonable care in having the cars or other vehicles reasonably safe for the carriage. The fact that the cars are being run for hire is an invitation to all who desire to use them that they are reasonably fit for the purpose. A person who invites another to come on his premises undertakes with regard to that person a duty to take reasonable care that the premises on which he invites the person to come, the approach to the premises as well as the exit, shall be in such a state as not to expose the person using them in consequence of the invitation to undue or unreasonable danger. See *Chapman* v. *Rothwell*, E. B. & E. 168 ; *Holmes* v. *North Eastern R. W. Co.*, L. R. 4 Ex. 254, S. C., L. R. 6 Ex. 123 ; *Wright* v. *London & North Western R. W. Co.*, L. R. 10 Q. B. 298. This is the implied engagement of a railway company to any passenger who comes on their premises : per Blackburn J. in *Gallin* v. *The London & North Western R. W. Co.*, L. R. 10 Q. B. 212, 215.

As a general rule, a railway company inviting the public to travel by their line is bound to provide means of access

to and egress from their carriages and station which can be used without danger: per Cleasby B. in *Bridges* v. *North London R. W. Co.*, L. R. 6 Q. B. 377, 382.

It is the duty of the carrier of passengers for hire generally to abstain from exposing them by any act or default of his to unusual and unnecessary danger: per Willes J., Ib., p. 408.

It is an implied part of the contract of carriage that the carriers and their servants will use reasonable care and skill in the conveyance of the passenger to his agreed destination: per Brett J., S. C. L. R. 7 H. L. 231.

If there be an implied engagement that the entrance to and exit from the cars shall be reasonably safe for the purpose, there must be the same implication in regard to the carriage itself. The law is so at all events as regards patent defects. See *Redhead* v. *The Midland R. W. Co.*, 9 B. & S. 519; *Moffatt* v. *Bateman*, L. R. 3 P. C. 115.

In *Taylor* v. *The Peninsular & Oriental Steam Navigation Co.*, 21 L. T. N. S. 442, which was an action caused to the plaintiff by his falling down an opening in the saloon of a steamer in which he was a passenger, Cockburn, C. J., charged the jury that if the plaintiff was rightfully on board, the defendants as against him were bound to keep that part of the ship in a reasonable state of safety, or give the passengers notice or warning of any unusual danger, and that it was incumbent on all the company's servants to warn the plaintiff when they saw him rushing into danger.

So long as this company permit passengers to stand on the platforms and steps thereto in front and rear of the cars, whether the cars are full or not, I think they impliedly undertake, at all events as against patent defects, that the platform and steps thereto are reasonably safe for the purpose. The step in question was not safe. Its want of repair was a patent defect. The company before the accident knew that it was not safe, and regardless of the warning of the conductor allowed the car to be used like other and more perfect cars for the

carriage of passengers, and the deceased without warning of any kind was permitted to step on the part that was unsafe, and in consequence lost his life. For his death the company is, I think, responsible unless it appear that the negligence or default of the boy himself was in some degree the direct or proximate cause of the injury: *Tuff* v. *Warman*, 2 C. B. N. S. 740, S. C. 5 C. B. N. S. 573; *Witherley* v. *Regents Canal Co.*, 12 C. B. N. S. 2; *Bradley* v. *Brown*, 32 U. C. R. 463.

This brings me to the third and last enquiry in this case. Can it be said on the evidence, that the deceased was so much at fault in what he did, that his negligence as a matter of law disentitles his representative from the recovery of damages in respect of his death? There is no subject as to which Judges more widely differ than on this question of contributory negligence, that is to say, when the case is for the Judge, and when for the jury.

The leading case at present is, *Bridges* v. *The North London R. W. Co.* It is three times reported. It was an action by a widow to recover compensation for the death of her husband through the negligence of defendants. The principal facts were few. A train in which the deceased was travelling drew up to Highbury station. He was sitting in the last carriage, which carriage was stopped in a tunnel which terminates at the station and not at the platform. The name of a station was called out by a porter. The deceased immediately got out, fell, and was killed. Blackburn, J., before whom the case was tried, nonsuited, but on a strong expression of disapprobation from the jury reserved leave to the plaintiffs to move to enter a verdict for £1200: L. R. 5 C. P. 459, note.

On the application to the Court of Queen's Bench to set aside the nonsuit there were present Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Lush, and Lord Chief Justice Cockburn. The Chief Justice was of opinion, with a certain qualification, that there was a case for the jury, but he said if a rule was granted it would be certain in that Court to be discharged, and therefore he agreed

in refusing the rule *nisi*. The case was next carried to the Court of Exchequer Chamber. In that Court four Barons, namely, Barons Bramwell, Channel, Pigott, and Cleasby were of opinion that the nonsuit was right. The Lord Chief Baron, Mr. Justice Willes, and Mr. Justice Keating were of a contrary opinion: L. R. 6 Q. B. 377.

The case was next appealed to the House of Lords. The Judges were summoned to give their opinions. Five assembled. Of these, two, namely, The Lord Chief Baron and Mr. Justice Keating, were of the same opinion as previously expressed by them, namely that the case should have been left to the jury. The remaining three, Mr. Justice Brett, Mr. Justice Denman, and Mr. Baron Pollock, were also unanimously of the same opinion. And the law Lords Cairns and Hatherley were of the same opinion. So that in the end the rule was made absolute to enter a verdict for £1200, in a case where Mr. Justice Blackburn, one of the most eminent Judges on the English Bench, took upon himself entirely to withdraw the case from the consideration of the jury: L. R. 7 H. L. 213.

Although this celebrated case was not strictly speaking one of contributory negligence, I find among the opinions of the learned Judges who took part in it some of the best expressions of the law of contributory negligence that are now to be found.

Mr. Baron Pigott said, at p. 325. "The question is, whether there was evidence in the case on which a jury could properly find that Mr. Bridges came to his death by the negligence or improper conduct of the defendants' servants. If there was not the Judge was bound to withdraw the case from them": L. R. 6 Q. B. 385.

Mr. Baron Channell said: "I do not think that in all cases the question of contributory negligence must necessarily be left to the jury. It is true that in ordinary cases the plaintiff is not bound to negative contributory negligence, so that in such cases the defendant must prove the contributory negligence if it exists; yet if facts are disclosed on the plaintiff's case, the truth of which is not

disputed, and which, if true, clearly shew that the plaintiff contributed to the accident, then the Judge *may* nonsuit; not because he can take upon himself to find the contributory negligence proved, but because in such a case the plaintiff fails upon an issue which lies upon him, viz., the issue whether the damage is caused by the negligence of the defendants." He then adds the following prudent words: "Of course, it may usually be a proper course for the Judge to take the opinion of the jury, in order to save the expense of a second trial in case of his own opinion being overruled by the Court." Ib. 394.

Mr. Baron Pollock said: "Although the question of negligence or no negligence is usually one of pure fact, and therefore for the jury, it is the duty of the Judge to keep in view a distinct legal definition of negligence as applicable to the particular case; and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present an hypothesis which comes within that legal definition, then to withdraw them from their consideration." S. C. L. R. 7 H. L. 221.

Mr. Justice Denman said: "The question of negligence, is one peculiarly within the province of a jury, and I apprehend that it is a question with the decision of which the Judge should not interfere, unless he is very certain that the question has been reduced to a mere definition of what is the defendants' legal duty in respect of the matters wherein negligence is alleged, upon a well ascertained and indisputable state of facts. The legal duty itself often depends upon the question what it would be reasonable for a plaintiff or a defendant to do under a complicated state of facts: and this also is a question not of law but of fact, and as such peculiarly within the province of a jury." *Ib.* 229.

Mr. Justice Brett, however, who appears to have taken great trouble in making his opinion full and practicable, said: "The Judge, before directing the jury, must, therefore first determine the following questions * * Are there facts in

evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the plaintiff had been injured by some act of commission or omission by the defendants or their servants? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that any such act of commission or omission was such as a person of reasonable care and skill under the same circumstances would have done or omitted to do? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the plaintiff had not, in a manner contributing to the accident, done anything or omitted to do anything which a person of ordinary care and skill under the same circumstances would not have done or would have done? If the Judge, not deciding the final issues according to his own individual view, but determining according to the propositions last laid down, holds that there is no evidence fit to be left to the jury on some one of the cardinal questions before stated, he must direct the jury as a matter of law that there is no case in favour of the plaintiff, or he must nonsuit the plaintiff. If he holds that there is evidence on each of the cardinal questions, he must leave the case to the jury according to the direction in point of law before laid down in this opinion. * * * * What men of ordinary care and skill would or would not do under certain circumstances is matter of experience, and so of fact, which a jury only ought to determine." *Ib.* 233, 234.

The opinion of Mr. Justice Brett has been referred to with approbation by Mr. Justice Burton and Mr. Justice Patterson recently, in *Anderson* v. *The Northern R. W. Co.*, 25 C. P. 310, in the Court of Appeal, on a question of contributory negligence.

These two learned Judges there thought that the case should not have been withdrawn from the jury. The Chief Justice and Mr. Justice Strong were of a different opinion. So the Court was equally divided.

Reliance may be placed by the defence on *Adams* v. *The Lancashire & Yorkshire R. W. Co.*, L. R. 4 C. P. 739. In

that case negligence on the part of the defendants as to the fastening of the door of the railway carriage was shewn, but it was also shewn that the plaintiff without any necessity got up to close the door. Mr. Justice Brett left the case to the jury. But Justices Byles and Smith were of a different opinion, and Mr. Justice Brett reluctantly changed his opinion.

In *Gee* v. *The Metropolitan R. W. Co.*, L. R. 8 Q. B. 161, 168, when the case was cited as an authority Mr. Justice Brett said, "I have ever since repented of having given way in that case." So at p. 176, he is reported to have said, "Whether that decision was correct in applying the rule which it laid down to the evidence before the Court, I confess I at this moment very much doubt. I was a party to that judgment, as I have stated, but I think it is obvious, from the form of all the judgments in that case that I was a reluctant party at the time to that judgment; but the authority of the other Judges was so great that I could not resist it, and I think, if that case were to come into a Court of Error, I should be prepared now to say that, although the rule laid down was right, yet its application to the circumstances was wrong."

And Mr. Justice Keating, at p. 173, is reported as dissenting from the rule laid down in *Adams* v. *The Lancashire, &c., R. W. Co.*

So far as *Adams* v. *The Lancashire R. W. Co.* is in conflict with *Gee* v. *The Metropolitan R. W. Co.*, the latter being the decision of a Court of Error must prevail.

In *Gee* v. *The Metropolitan R. W. Co.*, L. R. 8 Q. B. 168, Chief Baron Kelly said, "If there is evidence of negligence on the part of the defendants, and of contributory negligence on the part of the plaintiff, that must always be a question for the jury, and it is not a case for a nonsuit."

In the last mentioned case it was proved that the plaintiff, being a passenger on the defendants' railway, got up from his seat, and put his hand on the bar which passed across the window of the carriage with the intention of

looking to see the lights at the next station. The pressure caused the door to fly open, and the plaintiff fell out and was injured. Leave was reserved to enter a nonsuit on the ground of contributory negligence.

In giving judgment in the Queen's Bench, Lord Chief Justice Cockburn said, at p. 165, "I quite agree that the passenger must not do anything inconsistent with what passengers ordinarily do on a journey," and held that the plaintiff had not so acted that he should be nonsuited.

Blackburn, J., said, at p. 166, "Looking out of the window, though not a necessary act on the part of the passenger, was not an improper act."

Quain, J., said, at p. 167, "It appears to me that the question is, whether the plaintiff knowingly did an act of a perilous nature voluntarily."

When the case was before the Exchequer Chamber, Chief Baron Kelly said, at p. 171, "I am of opinion that any passenger in a railway carriage, who rises for the purpose either of looking out of the window, or of dealing with, and touching, and bringing his body in contact with the door for any lawful purpose whatsoever, has a right to assume, and is justified in assuming, that the door is properly fastened."

Mr. Justice Keating said, at p. 174, "But it appears to me that the plaintiff had a right to assume that the company were not negligent, and that all the doors were properly shut; and having a right to assume that, he had a right to get up and do what he did."

Cleasby, B., said, at p. 177, "It is impossible, as it appears to me, to say that in getting up and touching and pressing against the door as he did, there was anything in the nature of negligence at all."

See also *Richards* v. *Great Eastern R. W. Co.*, 28 L. T. N. S. 711.

Now to apply the principles of *Gee* v. *Metropolitan R. W. Co.* to the present case, can it be said that, beyond doubt or controversy, the deceased did anything improper, or

that he knowingly did an act of a perilous nature voluntarily ?

He had the right to assume that the defendants were not guilty of negligence ;—that the car and every part of it on which he was travelling was fit for the purpose for which it was being used ; and so assuming, would without looking naturally put his feet on the place where the step ought to have been, and where it would have been had there been no negligence on the part of the defendants.

As said by Chancellor Johnson in the recent case of *Spooner* v. *The Brooklyn City Railroad Co.*, 13 Am. 572, "A passenger upon such a vehicle has a right to assume that the parts of the vehicle prepared for the use of passengers and destined to receive them while in transit, are suitable and safe for the purpose."

Under these circumstances I do not think the omission of the deceased to see the want of the step can, as matter of law, be said to be contributory negligence.

But in what other particulars is it said that he was guilty of contributory negligence ? The learned Judge, on the motion for the nonsuit, intimated that a passenger who, when there was plenty of room in a car, voluntarily stands on the front platform or attempts to get off at the front rather than the rear, can scarcely attribute his accident to the negligence of the carriers.

This, as a ground of nonsuit, contains a double proposition :

1. That an attempt to get off at the front rather than at the rear is such contributory negligence as in law to prevent recovery.

2. That standing on the front platform when there is plenty of room inside is such contributory negligence as in law to prevent recovery.

It must have been for the jury to say on the evidence whether the deceased *did* attempt to get off at the front rather than the rear. If, instead of attempting to get off, he had no such intention, and fell off while intending to pursue his journey, this ground of nonsuit must fail. The weight of evidence appears to be in favour of the supposi-

tion that he fell off and did not voluntarily attempt to get off. But even if it were otherwise the fact is one in controversy, and the jury the proper tribunal to dispose of it.

This alleged matter of fact must therefore fail as a ground of nonsuit. All that remains is the fact that the deceased stood on the front platform while there was room for him inside the car. Was this *per se* a ground of nonsuit? It is notorious, and was proved at the trial, that passengers are permitted by the company to stand on the platforms whether there is room inside or not. It is not supposed, either by the company or the public, that persons who do so run any very great risk. It is very different from standing on the platform of a train propelled by steam.

The fact that there is no rule of the company against standing on the platform, and that persons disposed to do so are permitted to do so without let or hindrance, goes to shew that so far as the company and the public are concerned persons who do so are not looked upon as doing what a man of ordinary care ought not to do. Is there any more danger in standing on the platform of a street car drawn by horses than there is in sitting on the top of an omnibus or a stage driven by horses? Has it ever been held that persons sitting on the top of an omnibus in London, or on the top of a stage coach going into the country, are *per se* guilty of negligence? I am not aware of any such case.

I assume if there were such a case Mr. Ferguson, the counsel for the company, would have found it, and cited it in the argument. The absence of a decided case of the kind, where if the law were so such cases would be found, is an argument against the existence of such a law.

In the United States the contrary, with much reason, has been held to be the law. In *Caldwell* v. *Murphy*, 1 Duer 233, it was held that taking a seat on the top of a stage coach, there being seats provided on the top, is not negligence on the part of the passenger.

Cornish v. *Toronto Street R. W. Co.*, 23 C. P. 355,

has some bearing on the question. The direction there was, *that the mere fact of the plaintiff standing outside of the car did not amount to negligence, as he did so with the assent of the defendants.* Objection was made to the charge. Leave to enter a nonsuit was reserved. A nonsuit was moved, pursuant to leave reserved, on that and other grounds, and the rule *nisi* was discharged.

In that case, however, it is only right to notice that the car was proved to have been very crowded, and that there was no room for the plaintiff inside. In this case it appears there was plenty of room inside. Does this difference in the facts call for a different rule of law? I think not. So long as passengers are permitted by the defendants to stand outside or sit inside at their pleasure, it is not open to defendants, who allow passengers to stand on the platform of the cars, and receive money from them of the like amount as if sitting inside, to say that persons availing themselves of this option are *per se* guilty of negligence.

So long as they carry passengers in cars they undertake that the cars are reasonably fit, at all events as against patent objections, for the purpose.

So long as they allow passengers to stand on the platforms they undertake that the platforms are reasonably fit, at all events as against patent objections, for the purpose.

If the risk is too much for them to run the remedy is in their own hands. Let them, like steam railway companies, prevent persons standing on the platforms. And those who find it necessary at present to enter the cars, or leave the cars, by piercing a miscellaneous crowd on one or other of the platforms in order to attempt to penetrate or escape from a denser crowd inside, will not object to the change.

True, the consequence may be that fewer passengers will be carried in each car, and less money made. True, that the effect of such a provision will be to render necessary the employment of more cars, more men, and more horses to carry a similar number of passengers, and consequent reduction of profits. But if the company desire to make

as much money as possible by carrying as many persons as possible, inside and outside of the car, and are not prevented from doing so by the municipal authorities, they must take the benefit with the *onus*—the gain with the liability.

In some cities, where the municipal authorities are so indifferent as not to interfere, these companies carry, or attempt to carry, regardless alike of the comfort of the passengers and the capacity of the horses, not only all for whom there is sitting accommodation but all who can find standing room inside the car between the seats. Would it be reasonable for them to contend that persons who, with their permission, stand inside the car are *per se* guilty of negligence? I think not. Nor have they, I think, any more right to contend that persons who, with their permission, stand outside of the car are *per se* guilty of negligence.

I have not seen any English case on the point. The United States decisions which I have seen are against such a contention.

In California it is held that the fact that the plaintiff was standing on the rear platform of a street car with his hand on the railing at the time of the injury, is not such contributory negligence as defeats the plaintiff's right to recover: *Seigel* v. *Eisen*, 41 Cal. 109.

In Massachusetts it is held that for a passenger to stand on the platform of a horse car is not negligence when invited or permitted by the driver, even though the passage be free: *Wilton* v. *Middlesex R. W. Co.*, 107 Mass. 108. See also *Meesel* v. *Lynn & Boston R. W. Co.*, 8 Allen 234.

A similar rule appears to prevail in the State of New York. See *Willis* v. *The Long Island R. W. Co.*, 32 Barb. 398, affirmed 34 N. Y. 670; *Clarke* v. *Eighth Avenue R. W. Co.*, 32 Barb. 657; *Colegrove* v. *The New York & Harlem R. W. Co.*, 6 Duer 382.

In Missouri the very point was ruled, viz., that at common law the fact that a street railway passenger voluntarily puts himself on the front platform of the car when there is room inside, will not relieve the company from

liability for injuries there received by him through the company's negligence: *Burns* v. *Bellefontaine R.. W. Co.*, 50 Mo. 139.

Judge Adams, in delivering the judgment of the Court, said: "The only material question is, whether, as a matter of law, the fact that the plaintiff voluntarily put himself on the front platform when there was room inside the car absolved the defendant from liability. This question is presented by the refused instructions asked by the defendants. The question of negligence is for the jury to decide from the facts and circumstances detailed in the evidence. Whether the front platform was a more dangerous place than inside the car is not a question of law, but of fact for a jury. If it be considered that the front platform was more angerous, yet the plaintiff was there without any objectione by the defendants or their agent. The defendants had the right to carry passengers on the platform, and passengers might stand there by the consent of the defendants' agent. In this case there was no objection at all by the defendants' agent to the plaintiff standing on the platform." See *McKeon* v. *Citizens' R. W. Co.*, 42 Mo. 79.

The rule is different where there is a regulation of the company against standing on the platforms, and the person injured is proved to have known the rule and disregarded it: See *McAunich* v. *Mississippi R. W. Co.*, 20 Iowa 338

But it seems to me that under any circumstances it must be a question for the jury, and not for the Judge to say that persons so acting are acting without reasonable care.

What men of ordinary care would or would not do under certain circumstances, is (as said by Mr. Justice Brett, in *Bridges* v. *North London R. W. Co.*, L. R. 7 H. L. 235,) *matter of experience*, and so of *fact*, which a jury only ought to determine. See further *Galena & Chicago Union R. W. Co.* v. *Yarwood*, 15 Ill. 468; *Pennsylvania R. W. Co.* v. *Zebe*, 33 Penn. St. 318; *Johnson* v. *West Chester & Philadelphia R. W. Co.*, 70 Penn. St. 357.

One would think that a man who, when travelling in a railway car, opens a window and voluntarily places his

arm or his head outside of the window, would as matter of law be so much at fault as to be disentitled to recover anything in respect of an injury to his arm or his head, but the authorities on the point are very conflicting.

In *Chicago & Alton R. W. Co.* v. *Pondrom*, 2 Am. 306, the Supreme Court of Illinois held a company liable for injury to a passenger's arm, although the arm was projected from the car window.

The Court held in like manner in *Spencer* v. *Milwaukee & Prairie du Chien R. W. Co.*, 17 Wis. 487; and *Barton* v. *St. Louis & Iron Mountain R. W. Co.* 14 Am. 418.

But decisions to the contrary will be found in *Holbrook* v. *Utica & Schenectady R. W. Co.*, 12 N. Y. 236; *Todd* v. *Old Colony & Fall River R. W. Co.*, 3 Allen. 18 S. C., 7 Allen 207; *Pittsburg & Connellsville, R. W. Co.* v. *McClung*, 56 Penn., St. 294; *Indianapolis & Cincinnati R. W. Co.* v. *Rutherford* 29 Ind. 82; *Louisville & Nashville R. W. Co.* v. *Sickings*, 5 Bush. (Ky.) 1; *Telfer* v. *Northern R. W. Co.*, 30 N. J. 188, 190. See also *Shearman & Redfield* on Negligence, 3rd ed. sec. 281; *Wharton* on Negligence, sec. 361.

Without going so far as Chief Baron Kelly in *Gee* v. *Metropolitan R. W. Co.*, L. R. 8 Q. B. 168, and saying that "If there is evidence of negligence on the part of the defendants, and of contributory negligence on the part of the plaintiff, that must always be a question for the jury, and it is not a case for a nonsuit"—I may say that in the majority of cases ordinarily occurring, the question of negligence, whether of plaintiff or defendant, must be submitted to the jury. But, unfortunately, this statement affords no guide whatever for any particular case.

In the State of Connecticut it was held, in accordance with the views expressed by Chief Baron Kelly, that negligence is so peculiarly a question of fact that even on *admitted facts* it should be left to the jury: *Beers* v. *Housatomuc*, 19 Conn. 556.

The law in this Province has always been different. It has here been held by both the Superior Courts of law that

where there there is no dispute as to the facts or the inferences to be drawn from them, the question of contributory negligence is for the Judge and not the jury: *Nicholls* v. *Great Western R. W. Co.*, 27 U. C. R. 382; *Winckler* v. *Great Western R. W. Co.*, 18 C. P. 250; *Johnston* v. *The Northern R. W. Co.*, 34 U. C. R. 432; *Boggs* v. *Great Western R. W. Co.*, 23 C. P. 573; *Thompson* v. *Grand Trunk R. W. Co.*, 37 U. C. R. 40; *Hay* v. *Great Western R. W. Co.*, 37 U. C. R. 456; *Anderson* v. *The Northern R. W. Co.*, 25 C. P. 301.

And this is the fair result of the majority of cases both in England and the United States—the proposition fairly established by the weight of authority in each country.

In *Keller* v. *The New York Central R. W. Co.*, 24 How. Pr. 172, it is said, "When the facts are so clear and decided. that the inference of negligence is irrestible, it is the duty of the Judge to decide; but when the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions."

In *Barton* v. *St. Louis & Iron Mountain R. W. Co.*, 14 Am. 418, 421, it is said, "Whether it is a question for the Court or the jury must be determined by the facts of the particular case. Negligence is in all cases in a certain sense a question of fact for the jury; that is, it is for the jury to determine whether the facts bearing upon the question exist or not. But when the facts are undisputed or are so clearly proved as to admit of no doubt, it is the duty of the Court to apply the law without submitting the question to the jury. This involves no invasion of the province of the jury, nor any infringement of their legitimate functions, no more than when the Court passes on a demurrer to the evidence, or on motions for new trials upon the ground of the want of any evidence to sustain the verdict of a jury."

In *Marietta & Cincinatti R. W. Co.*, 24 Ohio St. 654, it is said, "Where the question of contributory negligence depends on a variety of circumstances from which different minds may arrive at different conclusions as to whether there was

negligence or not, the question ought to be submitted to the jury under proper instructions." See also *Baltimore & Ohio R. W. Co.* v. *Whittaker*, 24 Ohio St. 642.

In the very recent case of the *Cleveland, Columbus and Cincinatti R. W. Co.* v. *Crawford*, 15 Am. 633, it is said, at p. 637, "In cases where such issues are made, the question of contributory negligence on the part of the plaintiff or his intestate, and of negligence on the part of the defendant causing the injury complained of, should be considered and determined upon the same principles and by the same rules exactly. There is no presumption of negligence, as against either party, except such as arises upon the facts proved. Indeed the presumption of law is, that neither party was guilty of negligence, and such presumption must prevail until overcome with proof. As a general rule, the existence of negligence on either side is a fact to be ascertained by the jury, under proper instructions from the Court."

And again, at p. 640, "As a general rule, whether contributory negligence existed or not is a mixed question of law and fact—that is to say, a fact for the jury to find from such testimony as the law regards as competent to prove it; and to be found in accordance with such rules as the Court may give to the jury for their guidance. Where, however, all the material facts in the case are undisputed, or are found by the jury, and admit of no rational inference but that of negligence, or that of due care, it is no doubt the duty of the Court to say to the jury as matter of law, the facts so appearing amount to negligence, or to due care, as the case may be, as it would be the duty of the Court to determine, as a question of law, what judgment should be rendered on a special verdict. But, on the other hand, if the testimony is conflicting, or the proper inferences to be drawn from the facts and circumstances doubtful, then it would be error for the Court to withdraw the case from the jury, or direct them to return a particular verdict."

If a jury should only find one way upon the facts, and a finding the other way would be set aside as

against evidence; in such a case, whether the negligence alleged be that of the plaintiff or defendant, a Judge may fairly and properly withdraw the case or defence from the consideration of the jury and direct a nonsuit: *Deverill* v. *Grand Trunk R. W. Co.*, 25 U. C. R. 517; *Wright* v. *Skinner*, 17 C. P. 317; *Campbell et al.* v. *Hill*, 22 C. P. 526; S. C., 23 C. P. 473.

In this case, as I have already said, the facts are such that the inference may be drawn either that the deceased got off the platform at the front car or fell off, and as it was for the jury to draw the inference, the case on this point was improperly withdrawn from the jury.

As to the remaining question, that the deceased having gone on the front platform when there was room for him in the car, it appearing that he did so with the permission of the defendants' servants, and did no more than others were proved to be constantly doing, I do not think the case on this point should have been withdrawn from the jury, and if the jury found that, under the circumstances, there was no contributory negligence, I should not feel disposed to disturb their verdict on that ground.

My conclusion on the whole case is, that the rule to set aside the nonsuit must be made absolute without costs.

WILSON, J., concurred.

MORRISON J.—I have the misfortune to differ with the majority of the Court. I do not think it necessary to consider whether the deceased was a passenger, or whether he was, as contended, lawfully on the car.

The question is, whether there was any evidence of negligence on the part of the defendants or their servants, which caused the death, to go the jury.

We too often see in actions of this kind that plaintiffs studiously omit calling witnesses who obviously could state the particular circumstances conducing to the accident.

In the case before us the driver, who was on the platform at the time and next to the deceased, and who

it was said was present during the trial, if called, would in all probability, have shewn how or in what way the lad came to his death—whether, as suggested, in his attempting to get off the car while in motion, and notwithstanding he saw and was aware of the want of a step on that side of the platform, or thinking that the step was there, without looking, placed his foot where he expected one to be and lost his balance, or whether he accidentally stumbled off the platform, or that in some other way the misfortune happened.

I fail to see any evidence shewing how the accident did happen. The testimony given at the trial leaves it to mere conjecture and surmise. The plaintiff was bound to make out affirmatively her case: *Hammack* v. *White*, 11 C. B. N. S. 588; *Cotton* v. *Wood*, 8 C. B. N. S. 568.

All that we have in evidence is a case of accidental death under circumstances, in the absence of testimony of how the accident happened inferentially, equally consistent with no negligence or negligence on the part of the defendants, and such evidence has been held to amount to no proof of negligence: *Cotton* v. *Wood* above cited, and *Toomey* v. *The London, Brighton & South Coast R. W. Co.*, 3 C. B. N. S. 146.

The plaintiff cannot succeed by merely placing before the jury a supposititious case. The accident having occurred, is not sufficient.

In *Hammack* v. *White*, 11 C. B. N. S., 588, Erle C. J. said, "I do not assent to the doctrine that mere proof of the happening of an accident throws upon the defendants the burthen of shewing the real cause of the injury."

The fact that a step was wanting at one side of the front platform in my opinion is not of itself evidence of negligence. If the deceased had disappeared, as a witness said, from the other side of the platform, it could hardly be contended there was any evidence of negligence.

Then in what way is the negligence shewn in connection with the want of a step? The deceased going on to the front platform and being there is no evidence; he went

there plying his business, selling of newspapers. If, after he finished soliciting possengers to purchase, he voluntarily attempted to leave the car from the front platform on the side wanting a step and while the car was in motion, he was rashly risking the danger of a fall and being run over. The accident happening under such circumstances would be the result of his own act, and not the consequence of neglect on the part of the defendants: *Siner et al.* v. *The Great Western R. W. Co.*, L. R. 3 Ex., S. C. 150, in Ex. Ch. L. R. 4 Ex. 117.

It was suggested that as there was little room for standing on the platform that the deceased was about to sit down, and that not noticing the absence of the step he fell off. I see no evidence of any such intention on his part. If I were to draw any inference I should find that he did not do so, as the fair presumption would be if his purpose, as argued, was to proceed further, he would have returned to the inside of the carriage where there was abundance of sitting room. I do not think we should infer negligence because a passenger in the car said that the deceased disappeared from the platform just before the accident, a circumstance which would equally appear in case the deceased, with a knowledge of the step being wanting, voluntarily attempted to descend or leap to the ground. In such case the loss of his life would be an accident resulting from his own act, and even assuming negligence in the defendants in the want of a step, that negligence was not the cause of the accident.

Stress was laid on the fact that the deceased said to a passenger he was going down to King street. He may have done so, but he may have changed his mind. While on the platform he may have been attracted by a customer, or some other cause prompted him to leave the car when he did. However, all such suggestions are mere conjectures.

I do not think it necessary to discuss whether there was evidence of contributory negligence, for until there is affirmative evidence of negligence that question cannot arise:

Bridges v. *North London R. W. Co.*, L. R. 7 H. L. 213, in which a great variety of opinions were expressed in the Queen's Bench and Exchequer Chamber and finally in the House of Lords, and these opinions shew that the evidence of negligence in actions of this nature must depend in each case upon the particular facts proved.

The Lord Chancellor (Cairns) after having the advantage of the views, I may say, of all the Judges, in delivering judgment said, "It is perfectly clear, that before this accident occurred the train had come to a stand still. It is perfectly clear that the carriage in which the deceased was seated was inside of the tunnel. It is equally clear that there was no platform opposite that part of the tunnel where his carriage stopped. It is perfectly clear that the tunnel at the place in question was, even on a clear night, imperfectly lighted; and on the night in question, the tunnel being filled with steam, it was practically without light. It is also clear that opposite the carriage where the deceased was seated there was, in place of a platform, a heap of hard rubbish; and it is clear that if the deceased in that state of things got out in the tunnel opposite this rubbish, he was exposed to the danger of receiving a fall from alighting on the rubbish in place of alighting on the platform. Up to that point, my Lords, it appears to me that there neither is negligence, nor evidence of negligence to go to a jury It was not negligence to stop the train in the tunnel; it was not necessarily negligence not to have a platform in the tunnel. But the question, and the only question in the case, appears to me to be this: Was there evidence to go to the jury that in this state of things the company or its servants so conducted themselves as to lead to the deceased getting out of the carriage at the time he did get out of it?"

The Lord Chancellor then proceeds to shew that there was such evidence.

These observations seem to me to be very pertinent and relevant to the case under judgment. Lord Cairns specifies several independent facts which he holds not of themselves to be evidence of negligence—any one of

which might, however, become an element in connection with some thing done or said by the company's servants, to constitute evidence of negligence—so here a step being wanting on one side of the front platform *per se* was not evidence of negligence, but that being the case, if the deceased at the time was induced or told to descend from the carriage on that side, or was invited to sit down there, and that he, acting on the suggestion to alight or invitation to be seated, missed his footing and fell, such circumstances I would say might be evidence of negligence; but I see no evidence or any ground for inferring that the servants of the defendants said or did anything which made it necessary for the deceased to leave the carriage at the time or to be seated on the platform, and so lead to the unfortunate accident.

I may here remark that it is quite apparent, and I take it to be the *ratio decidendi* in Bridges's case from the judgments of Lords Cairns and Hatherley, that if the deceased had left the carriage before the name of the station was called out, there was no evidence of negligence in that action.

If I had tried the case before us, without a jury, I would have found on the testimony adduced for the defendants, on the ground that there was no evidence of negligence on the part of the defendants or their servants.

On the whole, I am of opinion the rule should be discharged.

Rule absolute.

From the foregoing judgment the defendants appealed on the grounds:—

1. The appellants state that there was not at the trial of this cause any charge made or any evidence given by the respondent of any negligence or breach of duty by the appellants in any respect whatever, excepting the existence of an alleged defect in one of the steps of the car of the appellants in which the deceased, Lewis Harold Blackmore,

in the pleadings named, was at and before the time of the happening of the accident, which, according to the evidence, resulted in his death; and there was not at the said trial any evidence whatever adduced by the respondent to go to the jury, shewing that the said alleged defect, in the said step of the said car of the appellants, was the cause of the said accident, or was in any way connected with the happening of the same; and to entitle the respondent to recover against the appellants, it was incumbent upon her to shew by affirmative evidence that the said alleged defect in the said step of the said car was the cause of the said accident, which according to the evidence so resulted in the said death, and the evidence at most only shewed that the said defect in the said step might or might not have been partly the cause of, or might or might not have contributed to some extent to the happening of the said accident; and for these reasons—if there were no other—the learned Judge who tried the cause was quite correct in directing the said nonsuit to be entered: *Bridges* v. *The North London R. W. Co.*, L. R. 6 Q. B. 377, Ex. Ch.; *Hammack* v. *White*, 11 C. B. N. S. 588; *Cotton* v. *Wood*, 8 C. B. N. S., 568; *Toomey* v. *The London, Brighton and South Coast R. W. Co.*, 3 C. B. N. S. 146.

And the appellants further state, that even if there had been affirmative evidence adduced at the trial by the respondent, shewing that the said alleged defect in the said step of the said car was in some degree the cause of or contributed to the happening of the said accident, there was at the same time abundant evidence to shew that there was negligence on the part of the said deceased, Lewis Harold Blackmore, but for which the said accident would not have happened at all, and the said nonsuit was therefore properly directed by the learned Judge: *Tuff* v. *Warman*, 5 C. B. N. S. 573; *Winckler* v. *The Great Western R. W. Co.*, 18 C. P. 250; *Johnston* v. *The Northern R. W. Co.*, 34 U. C. R. 432; *Wharton* on the Law of Negligence, sec. 361; *Siner et ux.* v. *The Great Western R. W. Co.*, L. R. 4 Ex. 117, Ex. Ch.; *Shearman and Redfield* on the Law of Negligence, 3rd. ed., pp. 302, 340.

3. And the appellants further state that the evidence adduced on the part of the respondent at the trial did not shew that the said deceased, Lewis Harold Blackmore, was at the time of the happening of the said accident on the said car of the appellants as a passenger, but only as a mere trespasser, or at most as one who had not paid and did not intend to pay any fare, and under such circumstances no duty or liability as to him was cast upon the appellants, except as to gross negligence happening after notice to them that he was in the said car, and there was not any evidence of such gross negligence. That the evidence shewed that the said Lewis Harold Blackmore entered the said car as it was, and that the said alleged defect in the said step of the same was visible, and was the only defect or negligence alleged or complained of as having any relation to or connection with the happening of the said accident; and the respondent was therefore not entitled to recover against the appellants and the said nonsuit was properly directed: *Readhead* v. *The Midland R. W. Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379, Ex. Ch.; *Wharton* on the Law of Negligence, sec. 631, 632; *Brown* on the Law of Carriers 413; *Shearman and Redfield* on the Law of Negligence, 3rd sec. 264.

4. And the appellants further state that the evidence for respondent adduced at the trial did not shew that she, or any one on whose behalf or for whose benefit the suit was brought, had any pecuniary interest in the life of the said deceased, Lewis Harold Blackmore, or that there was any pecuniary liability of the said deceased in their or any of their favour, or that there was any reasonable hope within the meaning of the law of pecuniary advantage to them, or any of them, by reason of his surviving—even if this last could be taken into account; and for this reason the said nonsuit was properly directed: *Blake* v. *Midland R. W. Co.*, 18 Q. B. 93; *Dalton* v. *The South Eastern R. W. Co.* 27 L. J. C. P. 227; *Chapman* v. *Rothwell*, 27 L. J. Q. B. 315; *Duckworth* v. *Johnson*, 29 L. J. Ex. 25; *Barnes* v. *Ward*, 9 C. B. 392.

5. And the appellants further state that, inasmuch as it was clearly shewn by the evidence at the said trial, that the said deceased, Lewis Harold Blackmore, had not at the time of his death any estate or effects in Ontario, the respondent could not as a matter of law be his administratrix as alleged, and an action of this character can only be maintained by his personal representative, and for this reason the said nonsuit was properly directed: 22 Vic. ch. 93, secs. 1 and 4, being Consol. Stat. U. C., ch. 16 secs. 8, 9; *Williams* on Executors, 7th ed., vol. i., 401, 402; *Hensloe's case* 9 Co. 36 *b*, 39 *a*; *Graysbrook* v. *Fox,* Plowd. 275; *Marriot* v. *Marriot,* Gilb. Rep. 203, 1 Strange 666; *Bacon's* Abr. tit. Executors (E) 1; *Com.* Dig. tit. Administrator (A); Administration (B) 6; 4 *Burns,* Eccl. Law 9th ed., 291; Consol. Stat. C. ch. 78, being 10-11 Vic. ch. 6.

Respondent's reasons against the appeal.

1. There was evidence of negligence on the part of the appellants, and that the death of the deceased Lewis Harold Blackmore above named was occasioned by such negligence.

2. There was evidence that the platform and step of the car on which the said Lewis Harold Blackmore was travelling were not safe, and that the appellants knew of the defect, and that such defect was the cause of the accident which resulted in the death of the said Lewis Harold Blackmore.

3. There was evidence upon which the jury might have properly found that the said accident was occasioned by the said defect in the platform and step of the car aforesaid, and the same should have been submitted to the jury.

4. There was no evidence of negligence on the part of the said Lewis Harold Blackmore contributing to the said accident.

5. Even if there was evidence of contributory negligence on his part, there being evidence of negligence on the part of the appellants, the question was one for the jury, and the respondent should not have been nonsuited: *Gee* v. *Metropolitan R. W. Co.,* L. R. 8 Q. B. 161.

6. Even if there was evidence of negligence on the part of the said Lewis Harold Blackmore, it should have been left to the jury to say whether his death was occasioned by the negligence of the appellants, or by negligence on his own part.

7. There was evidence that the said Lewis Harold Blackmore was on the said car as a passenger to be carried by the appellants.

8. The evidence established at all events that he was lawfully upon the said car, and under such circumstances as not to be deemed a mere trespasser upon the same, and that the appellants were guilty of gross negligence which occasioned his death while he was so lawfully upon the said car.

9. The appellants did not use reasonable care and diligence in and about the carriage of the said Lewis Harold Blackmore on the said car, and are therefore liable in respect of such breach of duty for his death, which was occasioned thereby, or at all events there was evidence upon which the jury might properly have so found.

10. There is no evidence that the said Lewis Harold Blackmore had notice of the said defect in the platform and step of the said car, but, on the contrary, it was established that although the appellants knew of the said defect they permitted a passenger or passengers to stand upon the said platform, so that it might be presumed that there was no defect in the said platform or step when the said Lewis Harold Blackmore was on the said car and the platform thereof, and when he sustained the injuries which occasioned his death.

The authorities relied on by the respondent in support of the foregoing grounds are set forth in the judgment of the Court appealed from.

11. There was evidence of pecuniary interest on the part of the respondent in the life of the said Lewis Harold Blackmore upon which the respondent was entitled to recover: *Franklin* v. *South Eastern R. W. Co.*, 3 H. & N. 211; *Condon* v. *Great Southern & Western R. W. Co.*, 16 Ir. C. L. Rep. 415; *Duckworth* v. *Johnson*, 4 H. & N. 653.

12. It was established that the respondent had been duly appointed by the proper Court in that behalf administratrix of the estate of the said Lewis Harold Blackmore, and her right to maintain an action in that character cannot be questioned in this suit.

13. Letters of administration having been granted to the respondent by the proper Court in that behalf, it will not be assumed that there was no estate, although it may not have been shewn at the trial of this case that there was any estate.

Even if it appeared from the evidence at the trial that there was no estate, inasmuch as it did appear that the respondent was and is administratrix as aforesaid, the respondent is entitled to recover upon the issues raised by the pleadings for the damages claimed, and such damages would be assets in the respondent's hands to be administered.

The appeal was argued (*a*) June 20, 1876, by *Ferguson*, Q. C., for the appellants, and *J. K. Kerr*, Q. C., for the respondent. The argument was in substance the same as in the Court below.

September 15, 1876, DRAPER, C. J.—It is necessary in this case to consider the preliminary question, whether the deceased Lewis Harold Blackmore was a passenger in the defendants' railway car, as stated in the declaration, for reward, and whether the defendants were under any duty to carry him safely and securely.

Upon the evidence there is no pretence for asserting that he was to be carried for reward; but rejecting these latter words, it remains to be asked whether, under the facts proved, it was the duty of defendants to carry him safely and securely at the time the accident happened which caused his death.

It appears that the deceased, a lad of eleven years old,

(*a*) Present.—DRAPER, C. J. of Appeal; HAGARTY, C. J. C. P.; BURTON, J.; MOSS, J.

was one of a class well known in the city of Toronto, whose principal occupation is selling newspapers along the streets and thoroughfares, to travellers arriving and departing by railway cars and steamboats, and to any other customers they can obtain. The cars of the defendants are among those in which they ply their trade. Entering these cars, and frequently not quitting them until after they are moving, they pass hurriedly through trying to dispose of their papers. The conductors rarely, if ever, interfere with them for any purpose, but least of all to treat them as passengers liable to pay any fare.

In this manner the deceased entered one of the defendants' cars. The witness who noticed him could not say whether any other person came in at the same time, nor whether the car had stopped when deceased came in; but it was somewhere between Carlton and Crookshank streets. There were only four or five passengers. The car was going towards King street. It may be surmised that he had gone up Yonge street, and meeting the car, thought he would try for customers for his papers. He passed from the rear to the front, and through the door on to the platform, and having offered a paper to a passenger who was there, he stepped behind the driver and suddenly disappeared. There is nothing to shew whether deceased then intended to get off the cars or only to go down on to the step, which should have been, according to the normal state of things, on each side of the platform to facilitate the exit and entrance of passengers. If he had looked down he could have seen the step was not there. Deceased stepped sideways, *i. e.*, says a witness, "he did not turn as if he meant to get off." In passing behind the driver and on the front of the car, the side stepping would seem at least to make it probable that he meant to get off. But the question would remain, was the negligence of the defendants the cause? And the burden of proof lies upon the plaintiff to establish it in her favour. As at present advised, I should have much difficulty in so holding. The facts proved, excepting only that deceased said to a witness,

to whom he spoke in passing through the car, that he was going to King street, are not inconsistent with an intention to leave the car when he passed behind the driver.

There was no step to the platform; but if the car had been standing still, it cannot be reasonably inferred from the evidence that the fall would have occasioned any serious injury: the descent cannot have exceeded three feet. As it was, the deceased fell; the car passed over him; he was carried home, and died in about fifteen minutes.

I cannot adopt the argument of the plaintiff's counsel, that the deceased was lawfully in the cars until his fare was demanded. It may be assumed, nothing appearing to the contrary, that every one who enters the cars, remaining after they are in motion, is a passenger; but here is the additional fact, accounting for his presence, that he was in pursuit of his usual vocation, offering to sell newspapers. His passing from the rear to the front of the car, and going directly to the side, tends to the conclusion that he meant to go off at once, as in the street he might find a customer; but for his remark about going to King street, I should have thought it conclusive; but I feel no doubt he did not intend to pay any fare. The utmost that can be said is, that he was not prohibited from entering the cars to sell newspapers. If the Court should hold that this is sufficient to sustain this action, the defendants will be driven to put an end to the practice which has been so construed to their disadvantage.

In my opinion the appeal should be allowed, with costs, if the defendants press for costs, and the rule for setting aside the nonsuit should be discharged.

The case of *Moffatt* v. *Bateman*, L. R. 3 P. C. 115, appears to me in principle to govern this case. See *Holmes* v. *North Eastern R. W. Co.*, L. R. 4 Ex. 254; *Indermaur* v. *Dames*, L. R. 1 C. P. 284.

HAGARTY, C. J. C. P.—If the deceased were only in this street car on sufferance, or by permission, not as a passenger, but merely to ply his trade of selling papers, then I think the

company would be liable to him as to the ordinary passengers for any injury caused by reckless driving or negligent management of the car. But I am unable to see any breach of duty on their part to him as to the absence of a step, or the general state of the vehicle, so long, at least, as it was not in such a state as to be a mere trap for the injury of any person getting on or into it.

To a mere volunteer like a newsboy permitted to run through the cars to sell his papers, the absence or presence of a step on the forward platform beside the driver gives, I think, no cause of action.

The law seems reasonably clear on this point. In *Holmes* v. *North Eastern R. W. Co.*, L. R. 4 Ex. 257, Bramwell, B., said, "If the plaintiff had gone where he did by the mere license of the defendants he would have gone there subject to all the risks attending his going."

Channel, B., said at p. 258, "I quite concur in the rule laid down by the cases, that where a person is a mere licensee he has no cause of action on account of dangers existing in the place he is permitted to enter."

The very full judgment of Willes, J., in *Indermaur* v. *Dames*, L. R. 1 C. P. 284, affirmed in Error L. R. 2 C. P. 311, reviews the authorities. See also *Wright* v. *London and North Western R. W. Co.*, L. R. 1 Q. B. D. 252.

In my judgment the case turns wholly on the question of fact, viz., in what character was deceased on the car. As a passenger on a contract of carriage, or as a mere volunteer or licensee, selling his papers for his own purposes by the permission or sufferance of defendants?

I hardy think it a fair argument that we are to assume him rightfully there as a passenger till fare was demanded.

It seems to me, with great deference, that in the Court below the distinction has not been sufficiently pressed between an injury arising from such a defect as the want of a step, and an injury from careless driving, or collision, or any other negligence in the act of carrying.

On the evidence the learned Judge held that there was no evidence, or at most only a scintilla, of deceased being received as a passenger.

The plaintiff's evidence shewed that the calling or employment of deceased was that of a newsboy selling papers: that he was on this car offering papers for sale: that these boys are seen coming on the street cars with papers; coming in at one end, going out at the other, and jumping off, and the only witness questioned on the subject, adds that "*he never saw them pay.*"

It is urged that the deceased must be considered as an ordinary passenger until the contrary is shewn.

At the trial the answer given to the objection was, that he was rightfully on the car till fare was demanded. This hardly meets the point. If there as a mere volunteer by the license of defendants he may be said to be rightfully—at least not wrongfully—there till such license was withdrawn or revoked, and he still could not recover for the defect in the step.

It is not a question whether fare was or was not demanded, but whether he was there or not on a contract of carriage, express or implied.

There was a direct traverse of the allegation in the declaration on this point, which the plaintiff had to establish.

On the evidence given at the trial it is not easy to see how a jury could properly have held that the deceased was there on a contract of carriage. The learned Judge held that there was no evidence, or at most only a scintilla of evidence, that he was received as a passenger. Unless we are to assume that every person in the street car must be assumed to be a passenger on a contract of carriage until the defendants prove that he was there in some other character, there is no evidence whatever.

In most cases of injuries in railways, &c., the evidence must be such that the inevitable implication would be that the person injured was an ordinary passenger. But where, as here, the evidence shews in what apparent character the person injured was there, the ordinary implication would seem to fail.

If in the hall or office of a large hotel newsboys or others were seen coming in and going out, offering newspapers,

&c., for sale, I do not think there would be any implication in the event of an accident that such persons were guests in the hotel, or were there under any contract, express or implied, with the host or owner that the premises should be kept in any particular order or condition.

On the present state of the authorities we cannot send cases down for trial merely because there might be a scintilla of evidence. In the view I take of the law governing the company's liability here, if the case went down to trial it must only be to ascertain whether the deceased was or was not on the car on a contract of carriage.

I think the appeal should be allowed and the nonsuit stand.

BURTON, J.—It is alleged in the declaration, which contains only one count, that the deceased was received by the defendants' as a passenger to be carried, and issue is distinctly taken on that allegation.

The fact then which the plaintiff undertook to establish, and which she was bound to prove before she could recover against the defendants, was, that the deceased was so received; and the question is, not whether there was any evidence, but whether there was any which ought reasonably to have satisfied a jury that the fact so sought to be proved was established.

The evidence upon this point is very short. It is not shewn or pretended that a fare was actually paid, but that the deceased, who was a newsboy in the habit of peddling papers, got upon the car—one of the witnesses thinks when in motion—and passed through it to the front platform, from which he suddenly disappeared. The witness says he saw a fare collected from a passenger who was standing on that platform near the deceased, and one of the witnesses spoke of having frequently seen these boys, *i. e.*, newsboys, come on the cars with papers, coming in at one end and going out at the other, and jumping off. He adds, that he never saw them pay.

There was no evidence given on the part of the defend-

ants after the expression of the learned Judge's opinion at the trial that the plaintiff had failed to sustain this issue—no attempt was made to support it by additional evidence. Judges are not to determine facts, and if therefore there was any proper legal evidence here of any facts from which a jury could reasonably infer that the deceased was received as a passenger, these facts should have been submitted for their determination; but Judges must be assumed to know as well as jurors what is the usual and normal state of things occurring in ordinary life, and to hold that what is shewn here furnished any evidence that the deceased was received as a passenger would be, in my opinion, to adopt a very different rule for one's guidance from that which is ordinarily pursued by intelligent people in the management of their daily affairs. I think the evidence far more consistent with what we all know to be the usual practice of these newsboys in intruding themselves upon the cars, and that in such a case therefore the plaintiff, upon whom the onus of establishing that issue lay, was bound to go further and prove affirmatively that the deceased was a passenger.

If a passenger at all, I agree with the learned Chief Justice of the Queen's Bench that it is not important whether he paid a fare or was allowed to travel free. But holding that there was no evidence to sustain the issue I think the learned Judge was right in directing a nonsuit.

This would be sufficient to dispose of the case upon the pleadings; but it is said that if the deceased were there at all with the permission of the defendants, though not as a passenger, they would be liable.

I would remark that no application appears to have been made to amend the pleadings with the view of setting up such a case, either at the trial or upon the argument; but no amendment that could be made would enable the plaintiff to recover upon the facts in evidence. Assuming for the purposes of this case that the defendants would be bound by any license or permission given to the deceased by the driver he was at best in the position of a licensee,

and although whilst there the defendants would not be justified in injuring him by careless driving any more than they would be by recklessly driving over him if on the street, it is clear that there was no duty on the part of the defendants as regards the deceased to have the step of the cars in any other condition from that in which he found it when he availed himself of the permission to enter. He acquired no right, and whatever may have been the obligation of the defendants as regards their passengers, they owed no duty to the deceased to keep the steps of the car in repair.

I am of opinion therefore, that the appeal should be allowed.

Moss, J.—At Nisi Prius the plaintiff was nonsuited, on the ground that there was no evidence, or at most only a scintilla of evidence, that the deceased was a passenger. From the notes taken at the trial, I infer that the learned Judge was of opinion that if, instead of being a passenger, the deceased was a mere volunteer or licensee, there was no breach of duty on the part of the company towards him in neglecting to restore the step, the absence of which occasioned his death; and that there was no evidence upon which a jury could reasonably be asked to find that he was a passenger, rather than a licensee.

After giving the case repeated and anxious consideration, I think that the really material question for our consideration is whether there was reasonable evidence to go to the jury in support of the allegation that the deceased was a passenger. When this question is answered, I think that the course of the Court is tolerably clear.

The majority of the Court of Queen's Bench were of opinion that there was such evidence; and if that conclusion be correct, I think the case should not have been withdrawn from the jury, but that their opinion should have been taken upon the question whether the company were guilty of any negligence in inviting passengers to enter a car without having restored the step in question.

The numerous authorities collected and reviewed by the Court seem to establish that in the case of a passenger it would be a proper enquiry whether the car was reasonably safe for the conveyance of passengers without the step. But these decisions, of which *Holmes* v. *North-Eastern R. W. Co.*, L. R. 4 Ex. 254, and *Gallin* v. *London & North-Western. R. W. Co.*, L. R. 10 Q. B. 212, furnish salient examples, do not touch the case of a mere licensee or volunteer. If there were reasonable evidence to go to the jury that the deceased was a passenger, these authorities are, in my opinion, sufficient to support the decision of the Court below, that the case should have been submitted to the jury. But I am unable to concur in the opinion that, because the deceased was lawfully on the car, it is not of much consequence whether or not there is such evidence. It could only fail to be of consequence if the rights of a person lawfully on the cars, as, for example, a licensee, were co-extensive with the rights of a passenger. Indeed, during the remainder of the judgment the Court proceeds upon this view of the law, and treats the authorities which have been decided with respect to the obligations of carriers towards passengers, or towards persons engaged in transactions of common interest to both parties, as defining the legal position of the parties to this litigation.

With great deference, I think that in taking this view the attention of the Court was not sufficiently directed to the difference that exists between the case of a passenger and that of a mere licensee.

Under certain circumstances, as, for instance, positive misfeasance by the carrier or his servant in the management of the conveyance, these rights may be co-extensive, but, in my opinion, the authorities clearly shew that where the question relates to the sufficiency of the vehicle itself, the rights of the passenger and of the mere licensee are very different. The passenger may have the right to insist that the vehicle shall be free from patent defects, as the Court of Queen's Bench holds; but the licensee must take the vehicle as it is. He cannot claim that it should have

been safer or stronger or better. He cannot insist that it should have been repaired before he entered it, or hold the carrier responsible because it was not as safe as it would have been if something had been done which has been left undone. That this is the true rule appears from the opinions of the Judges in *Hounsell* v. *Smyth*, 7 C. B. N. S. 731; *Southcote* v. *Stanley*, 1 H. & N. 247; *Indermaur* v. *Dames*, L. R. 1 C. P. 274, and various other cases of a similar character.

In the authorities relied upon in the judgment of the Court below, the rights of customers or persons entitled to call themselves passengers were under adjudication.

I think the result of the authorities undoubtedly is, that if the deceased was a mere licensee, who entered the car, not as a passenger, but for the purpose of plying his trade there, and whose presence was simply tolerated, the plaintiff has no right to complain because the safety of the car was not improved by the addition of a step.

If this be a correct statement of the law it follows that the only question is whether there was evidence reasonably sufficient to establish that the deceased was a passenger. It was incumbent upon the plaintiff to furnish some tangible evidence that he was in the car in that character. The consequences of any failure of proof upon that point must be visited upon her, not upon the company. The evidence, such as it is, so far from proving this, seems to me fairly to lead to the opposite conclusion. It is not clear whether the car was in motion when he got on. He entered at the rear and went through the car offering his papers for sale to the passengers.

One of the witnesses says, "he was allowed to stay in the car if he wished," indicating that the latent notion in his mind was that the boy was there on sufferance and as a licensee. Although there was plenty of room inside he passed out to the front platform, whether to look out for customers in the street, or for some other purpose, is not known. A fare was taken from a passenger who stood beside the driver upon the front platform, but none appears

to have been demanded from him. One of the witnesses had often seen boys come in the cars with papers, but he never saw them pay.

I cannot but think that these statements, which are the whole of the evidence with regard to the character in which the boy was present, instead of furnishing any reasonable ground for finding that he was a passenger, indicate that he was there—without objection indeed on the part of the company—but as a mere volunteer or licensee.

In the view that I have taken of the case it is unnecessary to examine the reasons which led Mr. Justice Morrison to differ from the majority of the Court. I may be permitted however to remark that they appear to me entitled to great weight, and to receive much confirmation from the judgment of the Privy Council in *Moffatt* v. *Bateman*, L. R. 3 P. C. 115.

I may add that although in forming my opinion I have excluded from consideration that knowledge which every person using the cars possesses, with respect to their use by newsboys, I am glad not to be called upon to exercise the cruel kindness of sending this case back for a new trial, upon which I am persuaded that every conductor and driver of the company could prove that the deceased, like his fellow newsboys, was a mere volunteer, who was tacitly permitted to enter and use the cars for the purpose of his vocation.

Appeal allowed, with costs.

Regina v. William Henry Smith.

Indictment for murder—Evidence of accomplice—Empannelling jury—Challenge for cause—Trial of.

Upon a trial for murder it appeared that the deceased was found dead in his stable in the morning, killed by a gun shot wound. The prisoner was a hired man in his house. His widow, the principal witness for the Crown, testified that she and her husband went to bed by ten o'clock: that afterwards her husband, being aroused by a noise in the stable, got up and went out: that she heard the report of a gun: that a few minutes after the prisoner tapped at the door, which she opened: that he said he had done it, and it was well done: that she asked him if he had killed her husband, and he said he had, and that it was for her sake he had done it: that he told her to keep quiet, and give him time to get into bed, which she did: that she waited a few minutes and then gave the alarm, calling the prisoner and another man who was sleeping in the house, who went out together and discovered the body. She also swore that the prisoner had previously told her he was planning the murder, but that she did not then consider him in earnest. There was evidence, apart from her own, of her improper intimacy with the prisoner; and a true bill had been found against her for the murder.

The jury were told that there was no direct evidence corroborating her testimony; the rule requiring the evidence of an accomplice to be confirmed was explained to them; and they were directed that before convicting they should be satisfied that the circumstantial evidence relied upon by the Crown did corroborate her testimony. They convicted; and questions were reserved under C. S. U. C. ch. 112, whether the widow was an accomplice, and whether there was sufficient evidence to submit to the jury. Held, that, whether she was an accomplice or not, there was no ground for disturbing the verdict.

Quære, per Harrison, C. J., whether the widow was an accessory after the fact, and whether if so she was such an accomplice as to require corroboration, according to the rule of practice.

Per Morrison, J., and Wilson J., she was an accessory after the fact.

After some jurors had been peremptorily challenged by the prisoner, and others directed by the Crown to stand aside, and when only one had been sworn, one M. was called and challenged by the prisoner for cause. At the suggestion of the Court, and with the consent of counsel, M. was directed to stand aside by the Crown "till it was ascertained whether a jury could be empannelled without him, on the understanding that if it appeared necessary or expedient the challenge for cause should be tried in the usual way." After the prisoner had made nineteen peremptory challenges, a juryman was called whom the prisoner desired to challenge peremptorily. The counsel for the Crown then asked that the question if M's competency should be tried in the usual way. The prisoner's counsel objected, but the Judge ruled with the Crown, and he certified that he so ruled because it was in accordance with the arrangement under which the juror was directed to stand aside: that no exception was taken to this ruling: that he was not asked to note any objection to the mode of empannelling the jury; and that he was first asked to reserve the question after the assize had finished, when upon the consent of counsel for the Crown, it was added to the other questions reserved. Held, that the jury were properly empannelled.

THIS was a case reserved for the opinion of the Justices of the Court of Queen's Bench, under Consol. Stat. U. C. ch. 112, by Moss J., before whom the prisoner was tried, at the Lambton Assizes, in the fall of 1875.

The offence charged was the wilful murder of Ralph Spence Finlay.

After some jurymen had been peremptorily challenged by the prisoner, and some others directed to stand aside by the Crown, and when only one juryman, John Harrison, had been sworn, the counsel for the prisoner challenged a juryman, Neil McVicar, for cause. At the suggestion of the Court, and with the consent of counsel, McVicar was directed to stand aside by the Crown, "till it was ascertained whether a jury could be empannelled without him, on the understanding that if it appeared necessary or expedient the challenge for cause should be tried in the usual way."

After the prisoner had made nineteen peremptory challenges, a juryman was called whom the prisoner's counsel desired to challenge peremptorily. The counsel for the Crown then asked that the question of McVicar's competency should be tried in the usual way. To this the prisoner's counsel objected. The Court ruled with the Crown.

John Harrison and Henry J. Clark, the two jurymen who had been first sworn for the purpose of the trial, were then sworn as triers to determine whether the challenge for cause should be sustained.

The cause assigned was that McVicar had already formed an opinion, had publicly stated that the prisoner was guilty, and that his mind was not unprejudiced.

The counsel for the prisoner, without objection, put certain questions to McVicar, and called George Lucas as a witness, who was duly sworn.

Their statements were as follow:

George Lucas.—In presence of a number of persons I heard McVicar say that if what people said was true, he believed he was guilty; from what he heard, he believed he was guilty.

Neil McVicar.—I have never expressed any opinion with regard to the prisoner. I know nothing about it. I live about forty miles from the prisoner. I don't think I said I believed him to be guilty. I didn't say so. I am free. I couldn't swear that I didn't say I thought from what I heard that he was guilty, but I couldn't say until I heard the evidence. Of course if I am returned to this jury, I shall hear the evidence, and give a verdict according to it, I have no prejudice against him.

The triers found McVicar to be competent. The prisoner's counsel did not peremptorily challenge him, although he had one challenge still left. McVicar was thereupon sworn, and the trial proceeded.

It appeared from the evidence that on the night of Friday, 21st May, 1875, or morning of Saturday, 22nd May, 1875, Ralph Spence Finlay was found lying dead in his stable. The death was undoubtedly caused by a gun-shot wound. There were circumstances which pointed to the prisoner as the murderer; but the principal testimony against him was that of the widow of the deceased. She swore that before and at the time of the killing the prisoner was a hired man in her husband's house: that the prisoner, on the night of Friday, went to bed about 9 o'clock: that her husband went to bed between 9 and 10 o'clock, that she herself went to bed about 10 o'clock: that afterwards her husband got up; that he was aroused by a noise in the stable; that he went out to the stable: that she got up within a quarter of an hour after he went out: that she heard what appeared to be the report of a gun: that the prisoner afterwards came to the front door, tapped at the door and she opened it: that this was a few minutes after she heard the report: that he said he had done it and it was well done; that she asked him if he had killed her husband: that he said he had, and that it was for her sake he had done it: that he told her to keep quiet and give him time to get into bed: that she did so: that she waited a few minutes and then gave the alarm: that she called him and another man named Shanks, who also was that night sleeping in the house, and

that the prisoner and Shanks came out together and discovered the body. She also swore that previously the prisoner told her he was planning the murder, but that at the time she did not consider him in earnest.

There was evidence, independently of hers, from which it might be inferred that the prisoner was too intimate with the witness during the life-time of her husband, and that this led to the murder of the husband.

Mrs. Finlay did not for a considerable time after the death divulge what she knew about the prisoner's guilt. It also appeared, in the course of the trial, that the Grand Jury had found a true bill against her for the murder of her husband.

Counsel for the prisoner objected that there was no case to go to the jury, because there was no evidence in corroboration of the widow's testimony.

The learned Judge, after hearing argument, declined to withdraw the case from the jury, or to hold that there was no corroborative evidence. He said that, so far as he could see, there was no evidence that the witness was a principal and no direct evidence that she was an accessory before the fact, as she had qualified her statements by declaring in effect that she did not consider the prisoner serious when he expressed his intention of killing her husband. The learned judge said that he was not clear that upon her own statement she was even an accessory after the fact, as she had admitted no more than that, knowing prisoner's guilt, she had not divulged it. But he intimated that, whatever his opinion was, there was some corroborative evidence proper for the consideration of the jury, and so the case was left to the jury.

He explained to the jury the rule requiring corroborative testimony to that of an accomplice, and pointed out that there did not appear to be any direct evidence corroborating the testimony of Mrs. Finlay. He told the jury that before convicting the prisoner they ought to be satisfied beyond reasonable doubt that the circumstantial evidence relied upon by the Crown did corroborate Mrs. Finlay's testimony

The jury found the prisoner guilty, and he was sentenced to death.

The learned Judge reserved for the consideration of the Justices of the Court of Queen's Bench, the following questions:

1. Does the evidence adduced at the trial on behalf of the Crown constitute Mrs. Finlay (against whom a true bill has been found for the murder of her husband, Ralph Spence Finlay), an accomplice, so as to render her evidence inadmissible otherwise than as an accomplice.

2. Whether the whole evidence for the Crown, including the evidence of Mrs. Finlay, is sufficient to warrant the submission of the same to the jury, owing to its insufficiency and the manifest incredibility of the evidence of Mrs. Finlay.

At the request of the prisoner's counsel, the learned Judge afterwards also made the following reservation:—

3. Whether the empannelling of the jury was proceeded with according to the law and practice in that behalf, so as to give full justice to the prisoner, and whether the objections taken by the prisoner's counsel to the mode of empanelling the said jury were not well taken and should have been allowed.

These questions were argued during Michaelmas Term, December 3, 1875. *Glass*, for the prisoner. The cause of challenge to the juror McVicar was not tried at the proper time: *Bac.* Ab., "Juries," E. 12. Nor was it tried by the proper persons: *Taschereau's* Crim. Law, vol. ii. 207; 3 *Blac.* Com. 363; 1 *Chit.* Crim. Law, 2nd ed., 549; 2 *Hale*, P. C. 274; *Arch.* Crim. Pl. 18th ed., 161; and it was not tried as the law directs: *Taschereau's* Crim. Law. vol. ii., 416; *Regina* v. *Wilkes*, 4 Burr. 2527, 2539; *Regina* v. *Geach*, 9 C. & P. 499; *Regina* v. *Lacombe*, 13 L. C. Jur. 259; *Mansell* v. *The Queen*, 8 E. & B. 54; *Arch.* Crim. Pl. 18th ed. 162; *Regina* v. *Dubois*, 18 L. C. Jur. 85; *Regina* v. *Whelan*, 28 U. C. R. 2, 50, 52, 54, 59, 62, 63, 65, 66, 67, 100, 105; *Mansell* v. *The Queen*, Dears. & B. 375; *Levinger v. The Queen*, 11 Cox, 619. Mrs. Finlay

was an accomplice, and there was no corroboration of her testimony: *Tomlins's* Law Dictionary, "Accessory;" 1 *Russell* on Crimes, 4th ed., 49; 4 *Black.* Com., 3rd ed., 29, 30, 32, 33; *Roscoe* Crim. Ev., 8th ed., 178; 3 *Russell* on Crimes, 3rd ed., 600, 602, 604, 605; 31 Vic. ch. 72 D; *Regina* v. *Jones,* 28 U. C. R. 416.

H. MacMahon, for the Crown.—It was quite competent for the jury to believe Mrs. Finlay, whether an accomplice or not, or whether corroborated or not, and the rule, if any, requiring the testimony of an accomplice to be corroborated is a rule of practice and not of law, and so not the subject of reservation under Consol. Stat. U.C. ch. 112: *Regina* v. *Stubbs,* 7 Cox 48; *Regina* v. *Boyes,* 1 B. & S. 311, 320. The course pursued as to the triers was the correct one: 2 *Hale,* P. C. 275; *Bac.* Abr. "Juries," E. 12; *Roscoe,* Crim. Ev., 8th ed., 210. The only objection made at the trial was as to the time not the mode of trial, and this is a mere matter of procedure, not of law: *Regina* v. *Whelan,* 28 U. C. R. 121; and so not the subject of reservation under Consol. Stat. U. C. ch. 112. No question as to the empannelling of the jury was reserved until long after the Assizes had closed, and this question, therefore, is not properly before the Court for adjudication.

As it did not appear, otherwise than from the statements of counsel, when or under what circumstances the question as to the empannelling of the jury was reserved, the Court, under sec. 6 of Consol. Stat. U. C. ch. 112, ordered the case to be sent back to the learned Judge for amendment.

The learned Judge amended the case by stating that he did not reserve any question at the trial as to the empannelling of the jury: that the only ruling he made with respect to the empannelling of the jury was, that the question of McVicar's competency should be tried, and he so ruled because it was in accordance with the arrangement under which McVicar was directed to stand aside: that no exception was taken to this ruling: that he was not asked to note any objection with regard to the mode of empannelling

the jury: that it was at least two weeks afterwards (while the learned Judge was holding the London Assizes), that the prisoner's counsel applied to him to make the additional reservation: that Mr. McMahon, who had acted as counsel for the Crown on the trial of the prisoner, attended upon the application, and upon his consent, he acting for the Crown, the learned Judge added to the case to be submitted to the Court the last mentioned reservation.

The case, as amended, was set down for argument during this term, and two questions arising thereout were argued. These were: *first*, whether the question as to the empannelling of the jury had, on the facts, been properly reserved for the consideration of the Court; and, *second*, whether it was a question of law under the statute.

February 11, 1876. *Glass*, for the prisoner. If the question arose on the trial it might be reserved by the Judge at any time between the trial and the second week of the term next following: *Regina* v. *Mellor*, 1 Dears. & B. 468, S. C. 4 Jur. N. S. 214, 27 L. J. Mag. Cas. 121; *Regina* v. *Baby*, 12 U. C. R. 346; especially if done with the consent of the Crown: *Regina* v. *Coote*, 10 C. L. J. N. S. 107, S. C. 12 Cox, 557; *Regina* v. *Daoust*, 9 L. C. Jur. 85, S. C. 10 L. C. Jur. 221; *Regina* v. *Manning*, 4 Cox 31; *Regina* v. *Martin*, 2 C. & K. 950; *Regina* v. *Martin*, 12 Cox 204; *Regina* v. *Murphy*, L. R. 2 P. C. 535; *Regina* v. *Patteson*, 36 U. C. R. 129. The question which arose as to the empannelling of the jury was a question of law under the statute: *Regina* v. *Manning*, 4 Cox 31; *Levinger* v. *The Queen*, 11 Cox 613; *Regina* v. *Patteson*, 36 U. C. R. 129; 32–33 Vic. ch. 29, sec. 3, D. It is asked that a *venire de novo* may be awarded. He referred to *Regina* v. *Coulter*, 13 C. P. 299, 300; *Regina* v. *Smith*, 1 Den. 510, S. C. Temple & Mew 214; *Regina* v. *Hambly*, 16 U. C. R. 617; *Regina* v. *Clark*, L. R. 1 C. C. R. 54; *Regina* v. *Featherstone*, Dears. 369; *Regina* v. *Whelan*, 28 U. C. R. 160.

H. MacMahon, for the Crown: It is admitted that if the question was one of law, the Judge had power at any time

during the Assizes to reserve it; but the question here was, as to the time of the trial of the challenge, one as to mere practice or convenience, and not as to any matter of law: *Regina* v. *Daoust*, 10 L. C. Jur. 22; *Regina* v. *Coote*, 12 Cox 557; *Regina* v. *Murphy*, L. R. 2 P. C. 535; *Arch.* Crim. Pl., 17th ed., 179, 184; *Regina* v. *Mellor*, Dears. & B. 468; *Regina* v. *Medda*, Leigh & Cave 81; *Regina* v. *Stubbs*, Dears. C. C. 555; *Regina* v. *Boyes*, 1 B. & S. 311, 312, 320; *Regina* v. *Clark*, L. R. 1 C. C. 54; 32 & 33 Vic. ch. 29, sec. 79, D.

March 17, 1876, HARRISON, C. J.—It is provided by sec. 1 of Consol. Stat. U. C. Ch. 112, that when any person has been convicted of treason, felony, or misdemeanor, before any Court of Oyer and Terminer, &c. the Judge before whom the case was tried may, in his discretion, reserve any question of law which arose on the trial for the consideration of the Justices of either of Her Majesty's Superior Courts of Common Law, &c.

This act is, in effect, the same as was 14–15 Vic. ch. 13, and the latter was in effect the same as Imp. Stat. 11 & 12 Vic. ch. 78.

In *Regina* v. *Mellor*, 4 Jur. N. S. 214, 222, Martin, B., speaking of the English Statute, is reported to have said: "I have always understood that this Act of Parliament was passed for the purpose of amending one of the greatest scandals of the law, that whilst in civil cases the most trivial objection entitled the parties, as of right, to a new trial, a prisoner whose life, as in this case, depends on the result, was prevented from getting his case reviewed, as to any error of fact, without he adopted a most circuitous and expensive course. I agree that we ought to give the most liberal construction to this Act of Parliament, for the purpose of giving to a prisoner an opportunity of asserting every right which he legally possesses."

The only right which a prisoner has under this statute is, to have a question of law reserved for the opinion of one or other of the Superior Courts of Common Law, in the

event of the Judge who tried the case seeing fit to reserve it. The only jurisdiction possessed by either of the Superior Courts of Common Law, under the statute, is, when a question of law arose on the trial and is reserved as the statute directs.

Three things appear to be necessary to give the Court jurisdiction under the statute.

1. That there be a question of law.

2. That it arose on the trial.

3. That it be reserved by the Judge who tried the case for the opinion of the Court.

The statute, as said by Sir John B. Robinson in *Regina* v. *Baby*, 12 U. C. R. 346–353, "gives us no authority to order a new trial, or to prevent a verdict of guilty from going into effect, because we may think the jury would have exercised a sounder judgment if they had acquitted. We may consider the evidence for the prosecution to be weak. We may find it to be conflicting, and may have a strong impression that if we ourselves had formed part of the jury we might not have been satisfied with it. But it is not in that point of view we are at liberty to refer to any case referred to us under the statute. We have only to pronounce judgment upon any particular legal exceptions which have been or may be raised either upon the pleadings or the evidence, or upon the general question, which is strictly one of law, whether there was legal evidence given at the trial sufficient to sustain the prosecution, taking it in as strong a sense against the defendant as it will bear, and supposing the jury to have given credit to it to its full extent."

The questions reserved for our opinion in this case are three, and are in effect as follows:—

1. Does the evidence adduced at the trial on behalf of the Crown constitute Mrs. Finlay an accomplice, so as to render her evidence inadmissible except as an accomplice?

2. Is the whole evidence for the Crown, including the evidence of Mrs. Finlay, sufficient to warrant the submission of the case to the jury?

3. Was the empannelling of the jury proceeded with

according to the law and practice in that behalf, and were the objections taken by the prisoner's counsel to the mode of empannelling the jury well taken ?

The first and second questions may be properly and conveniently considered together.

The words aider, abettor, accessory, and accomplice, as applied to crime, are often used as having the same meaning. But they are by no means synonymous. It is unlawful to aid or encourage the commission of crime. It is unlawful under certain circumstances to conceal the commission of crime. One who aids is, in ordinary language, called an aider or abettor. An accessory is one who takes an active but subordinate part. And an accomplice, according to the ordinary meaning of the word, would seem to imply one who not only takes an active part, but positively aids in the accomplishment or completion of the crime.

Aiders and abettors, in legal language, are persons who either actually or constructively are present at the commission of an offence, aiding and abetting or counselling and procuring the same to be done ; they are, in the case of felonies, principals in the second degree : *Brown's* Law Dictionary, " Aiders and Abettors." The aider and abettor must participate in the felony in the sense of acting in concert with those committing it, for although he be present, yet if he do not participate, but remains merely passive, he is not an abettor : 1 *Hale* P. C. 439.

An accessory is a person guilty of a felonious offence, not by being the actor or actual perpetrator of the crime, nor by being present at its performance, but by being in some way concerned therein, either before or after its commission : *Brown's* Law Dictionary, "Accessory."

An accessory before the fact is he that, being absent at the time of the actual perpetration of the felony, procures, counsels, commands, incites or abets another to commit it : 1 *Chit.* Crim. Law, 2nd ed., 262.

An accessory after the fact is he who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon : Ib. 264.

Principals in the first degree are those who have actually and with their own hands committed the fact.

Principals in the second degree are those who were present, aiding and abetting, at the commission of the fact. They are generally termed aiders and abettors, and sometimes accomplices; but the latter term will not serve as a term of definition, as it includes all the *participes criminis*, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact: 1 *Russell* on Crimes, 4th ed., 49, referring to *Fost.* 341.

If A knows that B hath committed a felony, but doth not discover it, this does not make A an accessory after the fact; but it is misprision of felony, for which A may be indicted and, upon his conviction, fined and imprisoned: 1 *Hale*, P. C. 618.

In this case I agree with the learned Judge who tried the case, in holding that there is no evidence that Mrs. Finlay was a principal. There is nothing to show satisfactorily that she was either aiding or abetting in the commission of the offence. If her statement that she did not believe the assertion of the prisoner that he intended to kill her husband be accepted as true, she certainly cannot be looked upon as an accessory before the fact. And I am not satisfied on the evidence that she was an accessory after the fact. Nor am I satisfied that an accessory *after* the fact is such an accomplice as, according to the rule of practice, requires corroboration.

But, assuming that she was an accessory after the fact, and that an accessory after the fact is such an accomplice as, according to the rule of practice, requires corroboration, it is impossible on any legal ground to disturb the conviction. In point of law, as the law now stands, the Judge is bound to tell the jury that they may find a verdict of guilty upon the unconfirmed testimony of an accomplice; but the usual course is to advise them not to do so. The jury may, notwithstanding, give credit to the accomplice and act upon his evidence, though not confirmed. They

generally, however, yield to the advice which the Judge offers them: *Regina* v. *Stubbs et al.* 7 Cox 48; *Regina* v. *Boyes*, 1 B. & S. 311: but their refusal to do so is no ground for interfering with the verdict: *Regina* v. *Seddons*, 16 C. P. 389.

The learned Judge in this case explained to the jury the rule requiring corroborative testimony to that of an accomplice, and pointed out that there did not appear to be any direct evidence corroborating Mrs. Finlay's evidence. He expressed to the jury the opinion that before convicting the prisoner they ought to be satisfied, beyond reasonable doubt, that the circumstantial evidence relied on by the Crown did corroborate Mrs. Finlay's testimony. There is no complaint in this respect as to his charge, Even if he had omitted to draw the attention of the jury to the necessity for corroboration, in a case where corroboration is necessary, his omission would have been simply a disregard of a mere rule of practice, and not a positive rule of law, and so would not have been the subject of reservation under the statute: *Regina* v. *Stubbs*, 7 Cox 48, 51; *Regina* v. *Beckwith*, 8 C. P. 274; *Regina* v. *Fellowes*, 19 U. C. R. 48, 51.

This disposes of the first two questions reserved for our opinion, in favour of the Crown.

Then, as to the third and remaining question: was the empannelling of the jury proceeded with according to the law and practice in that behalf, and were the objections taken by the prisoner's counsel to the mode of empannelling the jury well taken.

This question, unlike the preceding, was not reserved till after the trial, and after the prisoner had been sentenced. It was not reserved till after the particular Court of Oyer and Terminer had closed, and the learned Judge was holding the Assizes in a different county.

It is urged on the part of the Crown:

1. That the empannelling of the jury was according to the law and practice in that behalf.

2. That so far as there has been any, if there has been

any disregard of the practice, the question is not the subject of a reservation under the statute.

3. That the question on the facts stated in the amendment to the case was not properly reserved for the consideration of the Court.

If we should decide either the first or second point in favour of the Crown, it will be unnecessary to determine the third.

The Crown at common law had the right to challenge any number of jurors peremptorily without alleging any other reason than "*quod non sunt boni pro rege*" : 2 *Hawk.* P.C. ch. 43, sec. 23, *Co.* Litt. 156 *b*; *Bac.* Abr. "Juries," E. 10. This power was first controlled by the Statute 33 Edw. I., stat. 4, and is now by 32–33 Vic. ch. 29, sec. 38, D., limited to four jurors. The latter statute expressly declares that the enactment is not to be construed to affect the right of the Crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause.

The phrase "to stand aside" merely means that the juror being challenged by the Crown, the consideration of the challenge shall be *postponed* till it be seen whether a full jury can be made without him : *Mansell* v. *The Queen*, 8 E. & B. 54.

The Crown is not bound to shew any cause of challenge till "the panel has been gone through," and it appears that there will not be jurors enough to try the prisoner if the peremptory challenges are allowed to prevail : 2 *Hale* P. C. 271, 2 *Hawk.* P.C., ch. 43 ; *Regina* v. *Parry*, 7 C. & P. 836 ; *Regina* v. *Geach*, 9 C. & P. 499. And the panel is not to be considered as "gone through" until it has been not only once called over but actually exhausted : *Mansell* v. *The Queen*, 8 E. & B. 54 ; *Regina* v. *Locombe*, 13 L. C. Jur. 259 ; *Commonwealth* v. *Joliffe*, 7 Watts 585.

In *Mansell* v. *The Queen*, 8 E. & B. 54, 111, Mr. Baron Bramwell, speaking of the 33 Edw. I., stat. 4, said : "If the Act had been passed recently, I should have said that at a trial it was a reasonable request on the part of the counsel

for either the Crown or the party to ask that a juror whom he objected to might stand aside until it was seen whether a full jury of persons, to whom there was no objection on either side, could be obtained without him. And I should have thought that the Judge might postpone the time for assignment of cause for either side, not as a matter of right, but as a reasonable exercise of his discretion. But the Act was passed 500 years ago; and the uniform course of proceeding for centuries has settled that the Crown has the right to require the Judge to set aside any juror till the panel is perused. Consistently with this, I think the Judge may in his discretion, for sufficient cause, *further postpone* the time of assigning cause, either for the Crown or the prisoner, but not as a matter of right on a mere request without sufficient cause. I think the sufficiency of such cause a matter for his discretion; and like every other matter which is to be decided according to discretion, it ought not to appear upon the record, and is not examinable in error."

This language was quoted with approval by Draper, C. J., in *Whelan* v. *The Queen*, 28 U. C. R. 132, where the complaint was, that the prisoner was not allowed to challenge for cause till his peremptory challenges were exhausted, and the learned Chief Justice said: "The right of a prisoner to challenge for cause, though he has not exhausted his peremptory challenges, we fully recognize; but if, as I think, the right of postponing the hearing and trial of that cause is discretionary with the Judge, it must follow that the question becomes only one of practice, and therefore is not examinable in error."

In the same case Mr. Justice Gwynne, at p. 169, is reported to have said: "So far as the matter had proceeded, when the judgment of the Court was given, it was still only a matter of procedure, as it had been before, and if the judgment of the Court had been simply that the time had not arrived for the prisoner to insist upon the trial of the matter of the challenge, but that the learned Chief Justice, in the exercise of his discretion, would defer that enquiry until it could have been ascertained whether a

jury could not have been otherwise obtained, no complaint could have been made by the prisoner. Such a proceeding would, as it appears to me, have been a matter quite within the discretion of the learned Chief Justice as a matter of procedure, which could not have been made the foundation of an assignment of error, or *per se* proper matter to be placed upon the record."

If a juror be challenged for cause before any juror sworn two triers shall be appointed by the Court, and if he be found indifferent and sworn, he and the two triers shall try the next challenge, and if he be tried indifferent then the two first triers shall be discharged, and the two jurors tried indifferent shall try the rest: *Co.* Litt. 158*a*, 2 *Hale.* P. C. 275, *Bac.* Ab. "Juries," E. 12, 1 *Chit.* Crim. Law 549. If the prisoner challenge ten and the Crown one, and a twelfth be sworn, one trier shall be chosen by each party and added to the juryman sworn, and the challenges be referred to their decision. But if several be sworn and the rest challenged, the Court may assign any two of the persons sworn to determine the challenges: 2 *Hale* P. C. 275 *Bac.* Abr. E. 12, 1 *Chit.* Crim. Law 559.

Now, what took place at the trial in this case? Counsel for the prisoner challenged for cause a juror called Neil McVicar. It was competent for the Court either then to have had the trial for cause take place, or, as a matter of convenience, to postpone it till a subsequent stage of the proceedings. In the latter event McVicar would have to stand aside. The latter course was the one adopted. The juror challenged was, with the consent of both counsel, directed to stand aside "till it was ascertained whether a jury could be empannelled without him, on the understanding that if it appeared necessary or expedient the challenge for cause should be tried in the usual way." No objection was taken to this course. No question arose as to the power of the Court to postpone the trial for cause. The prisoner's counsel thereupon proceeded with his peremptory challenges. After he had made nineteen peremptory challenges, a juryman was called whom the prisoner's counsel desired to

challenge peremptorily. The counsel for the Crown then asked that the question of McVicar's competency should be tried in the usual way.

The only ruling that the learned Judge made at the trial with respect to the empannelling of the jury, was, in the words of the amendment of the case, "that the question of McVicar's competency should be tried," and this ruling, in the words of the case, was "*in accordance with the arrangement* under which McVicar was directed to stand aside."

We are, to use the words of Coleridge, J., in *Regina* v. *Mellor*, 4 Jur. N. S. 219, "bound to take anything stated by the Judge as an incontrovertible fact, and we have no more power of disputing the statement of the learned Judge, than we have anything upon the record."

The learned Judge having, in accordance with the arrangement under which McVicar was directed to stand aside, ruled that the question of his competency should be tried, two jurymen who had been first sworn were sworn as triers to determine whether the challenge for cause should be sustained, and, after hearing the evidence, they decided that McVicar was indifferent. No objection whatever was made as to the *mode* of trial. The only objection, apparently, made was as to the *time* of trial. This was mere procedure. I do not gather from the evidence that there was any good foundation for the objection; but even if I thought otherwise, I could not in this case give effect to it. The statute provides that questions of law may be reserved. This question is one of mere procedure, and not of law. We cannot therefore properly give any decision upon it. This conclusion renders unnecessary any expression of opinion on the question, whether the reservation, made as it was, not only after judgment and sentence, but after the particular Court had closed, was made in proper time.

The conviction must be affirmed.

MORRISON, J.—I quite agree in the result of the learned Chief Justice's judgment; but I wish to guard myself from concurring in that portion of it which goes to hold that the

witness, Anne Finlay, was not an accomplice. She certainly was an accessory after the fact, in my opinion.

Mr. Glass, for the prisoner, urged very strongly that the learned Judge erred in holding, or rather in expressing an opinion during the trial, that the witness was not an accomplice, and that whatever her position was, there was some corroborative evidence for the jury; and that in consequence of that expression of opinion the testimony of the witness went to the jury with untainted credit. Be that as it may, I cannot say that the learned Judge, in his charge, did not remove from the minds of the jurors any effect that this previous expression of opinion might have made, as he finally left the case to the jury with a charge as favourable to the prisoner as he possibly could do.

If the prisoner could have been prejudiced in his trial as suggested, it may be ground for an application to the authority with whom rests the discretion either of executing the law or commuting the sentence; but it can have no effect as to the legality of the conviction.

WILSON, J.—I think there is evidence that Mrs. Finlay was, on her own statement, an accessory after the fact. She said the prisoner told her when he came in from the barn on the night in question, and soon after her husband was killed: "I have done it, and it is well done." I asked him, have you killed him: he said, I have, and its for your sake I have done it. He did not remain at the door any length of time. He went away and went into the house. I cannot say how he entered. He told me to keep quiet and told me to give him time to get into bed. I closed the door. I locked it. That was the only way of closing it. I did not see him coming in. I waited a few minutes, and then called them. I went first to the back door to hear if there was any more noise. I heard none. I then called prisoner and Shanks. I think I called to Shanks. I told them to get up, that my husband had gone to the stable, and I was afraid there was something wrong."

Is that evidence of Mrs. Finlay, "knowing a felony to

have been committed by another, and of her receiving, relieving, comforting, or assisting the felon?"

Did she do any act to assist the felon personally?

She said the prisoner "told me to keep quiet and to give him time to get into bed. I closed the door." And after waiting a few minutes and finding all quiet—the prisoner having got into bed in the meantime—she called him and Shanks up, and told them, knowing that the husband had been killed by the prisoner, "to get up, that my husband had gone to the stable and I was afraid there was something wrong," which was manifestly to screen the prisoner from suspicion.

The giving time to the prisoner to get into bed, &c., are facts which, in my opinion, constitute the offence of receiving, relieving, comforting, or assisting him, as much so as if she had changed his clothes, or washed out marks of blood upon them, for the purpose of concealing the offence and preventing him from being suspected, taken, or punished.

There was something more than a mere *omission* to aid in the apprehension or conviction of the offender.

Assuming her to have been an accessory after the fact, was her testimony corroborated? I think it was not.

The learned Judge, however, proceeded rightly, because he says: "I explained to the jury the rule requiring corroborative testimony to that of an accomplice, and pointed out that there does not appear to be any direct evidence corroborating Mrs. Finlay. I expressed the opinion that before convicting the prisoner they ought to be satisfied beyond reasonable doubt that the circumstantial evidence relied upon by the Crown did corroborate Mrs. Finlay's testimony."

The learned Judge directed the jury in that respect more favourably for the prisoner than the prisoner could have claimed.

The direction commonly given to the jury is, that they are not bound to convict on the unsupported testimony of an accomplice or even an accessory after the fact: that it is not safe to do it: that they should not give credit to such

unsupported testimony; but that he cannot withdraw such evidence from their consideration: it is legal evidence, and being so, they may act upon it or not as they please, bearing in mind the caution and advice which they have received. Here, in effect, the jury were told not to act on the testimony of Mrs. Finlay at all unless it was corroborated. The prisoner cannot complain of that direction.

I am of opinion that Mrs. Finlay's evidence should have been treated as that of an accomplice; and as it was so treated I am of opinion the whole evidence for the Crown, including that of Mrs. Finlay, was sufficient to warrant the submission of the same to the jury; and that it was for the jury, under the proper direction of the Court which was given to them, to judge of its sufficiency or insufficiency, and whether there was manifest incredibility in the evidence of Mrs. Finlay or not.

The other question relates to the empannelling of the jury.

The facts are, that, "After some jurymen had been peremptorily challenged by the prisoner, and some others directed to stand aside by the Crown, and when only one juryman, John Harrison, had been sworn, the prisoner's counsel challenged Neil McVicar for cause. At the suggestion of the Court, and with the consent of the counsel, McVicar was directed to stand aside by the Crown till it was ascertained whether a jury could be empanelled without him, on the understanding that, if it appeared necessary or expedient, the challenge for cause should be tried in the usual way. After the prisoner's counsel had made nineteen peremptory challenges, a juryman was called whom the prisoner's counsel desired to challenge peremptorily. The counsel for the Crown then asked that the question of McVicar's competency should be tried in the usual way. To this the prisoner's counsel objected; but the Court ruled with the Crown."

The triers were sworn. The prisoner's counsel examined the witnesses. The juror was found indifferent. The prisoner's counsel did not then challenge McVicar per-

emptorily, he having one challenge still left, and McVicar was sworn on the jury.

The learned Judge has certified that he so ruled with the Crown "because it was in accordance with the arrangement under which the juror was directed to stand aside. No exception was taken to this ruling, nor was I asked to note any objection with regard to the mode of empanelling the jury."

The question, although not reserved at the trial, was, it appears from the case, properly reserved in the manner and at the time it was done.

And the question is: "whether the empannelling of the jury, as appears by the record thereof, was proceeded with according to the law and practice in that behalf, so as to give full justice to the prisoner, and whether the objections taken by the prisoner's counsel to the mode of empannelling the jury were not well taken and should have been allowed?"

One objection which the prisoner's counsel can make, is, that he was not allowed to challenge the twentieth juror peremptorily. If he had done so he would not have been upon the jury; and, as it was, he was not in fact upon the jury. So far there was no prejudice done or caused to the prisoner.

The other objection is, that McVicar, who had been challenged for cause by the prisoner, and who was also ordered to stand aside by the Crown "till it was ascertained whether a jury could be empannelled without him, on the understanding that if it appeared necessary or expedient the challenge for cause should be tried in the usual way," was, before the twentieth juror was challenged peremptorily by the prisoner, desired by the Crown counsel to be tried as to his indifferency, which the prisoner's counsel objected to. Was it objectionable on the part of the Crown to require that McVicar, who had been so challenged, should be produced as a juror and tried for the cause assigned? Or should McVicar have remained where he was till he was regularly called upon again by the marshall?

The course of proceeding when the prisoner challenges for cause is, that the juror is tried for cause at once; but

I think he may be required to stand aside for a time, and the cause be tried at a later stage, if it be more convenient as a matter of practice and procedure that it should be so, or the challenges for cause may be postponed until the peremptory challenges have been exhausted. If that is not assented to, I cannot say that such a rule can be enforced by the Court upon the prisoner, because after challenging for cause and failing to support his challenge, he may desire to exclude that juror in case he might be influenced against the prisoner by reason of the challenge for cause; and if he had been compelled to exhaust the whole of his peremptory challenges before that, he would then be unable to exclude the juror he had challenged for cause, whom he might have excluded, if his peremptory challenges had not been completed.

Jurors ordered to stand aside by the Crown are not called again till the panel has been gone through, and the jury is yet incomplete. In that case the panel is called over, omitting those challenged by the prisoner peremptorily, and the Crown may still have the juror stand aside so long as the panel can be made up by the requisite number of those who are not so ordered to stand aside, or who are not so challenged for cause and found not indifferent. If the panel cannot be completed otherwise than by calling those standing aside at the instance of the Crown, the Crown must then shew cause to each juror as he is called: *Mansell* v. *The Queen*, 8 E. & B. 54, 72.

McVicar, who was challenged by both parties, stood aside by the consent of the Crown and prisoner "till it was ascertained whether a jury could be empannelled without him." But it does not appear that it was ascertained that a jury could not be empannelled without him.

Then why was McVicar brought forward again, or if brought forward why was he not called from the panel in the usual way? It further appears, however, that McVicar only stood aside "on the understanding that if it appeared necessary or expedient the challenge for cause should be tried in the usual way." That is, as I understand the

arrangement, it was that McVicar should not be called at all if a full jury could be made without him; but if he were called—that is, if it appeared necessary or *expedient* to call him—the challenge for cause should then be tried. From the course taken at the trial I must presume it did become *expedient* to call McVicar, and to try the cause of challenge. The prisoner's counsel objected to it, it is said in one place, and in another part of the case it is said no exception was taken to it. Whichever way it was the learned Judge ruled with the Crown, "because it was in in accordance with the arrangement under which the juror was ordered to stand aside." I do not see in this course of proceeding anything which shews there was error, or anything unwarrantable done. It really was a matter of arrangement only, and what was agreed upon was carried out, there being nothing objectionable or dangerous, or prejudicial in the arrangement itself.

I am therefore of opinion that the empanelling of the jury was proceeded with according to the law and practice in that behalf, so as to give full justice to the prisoner; and that the objections taken by the prisoner's counsel to the mode of empannnelling the jury were not well taken, and should not have been allowed.

It is right I should say that any course of proceeding which gives rise to such niceties and questions, and especially in criminal proceedings of so grave a nature, is very greatly to be reprehended.

Why was not the challenge for cause tried at the time it was taken, and settled and determined? Why, if the juror stood aside, was he called forward at all till his name had been called again by the marshall, or if there were an agreement about the matter why was it not expressed in more explicit and unmistakable language?

The consequences of any inadvertence are so serious in these trials, and the means of avoiding all such questions are so plain and straightforward, that it is vexatious almost to jeopardise so much without any justification for it.

I am of opinion the questions must be answered in favour of the Crown.

Judgment for the Crown.

GIDEON MANN AND GEORGE MANN v. ALBERT ENGLISH AND THOMAS ENGLISH.

Mortgage—Right of mortgagee to maintain trespass or trover for cutting timber—Liability of joint wrongdoers.

The first count of the declaration alleged that one B. was the owner of certain lands, described, in fee simple, and mortgaged it to the plaintiffs in fee, subject to a proviso for redemption on payment of $1,350, and interest, by instalments, as specified: that it was provided in the mortgage that B. should not without the plaintiffs' written consent cut down or remove any of the standing timber until the first four instalments of principal, and interest up to a certain date, should have been paid; and that if default should be made in paying the interest the whole principal should become due. It then alleged a default in payment of principal and interest, and that defendants afterwards, without plaintiffs' leave, and against their will, entered on the land and cut down and removed timber and trees, thereby injuring the land, and making it an insufficient security to the plaintiffs for the mortgage debt. There was also a count in trover for the trees.

It appeared that the mortgage was one under the Act respecting short forms, with the ordinary proviso for possession by the mortgagor until default, and a covenant not to cut timber, as alleged. The jury, in answer to questions, found that R. had cut down the timber, the other defendant, E., assisting him, in order to sell it and leave the place depreciated: that the damage thus done was $150; and that defendants did not purchase the timber from R. (as had been asserted) believing that he was entitled to sell it; but they said, after their verdict had been recorded against both defendants on these answers, that they did not intend to find E. guilty.

Held, that the action was maintainable, and the verdict properly entered against both defendants, the jury having found them to be joint wrongdoers: that the mortgagee was not restricted to his action on the covenant, but might certainly maintain trover; and *Semble*, that, though not in actual possession, he might, under the circumstances, maintain trespass also.

Quære, whether the first count was in case for injury to plaintiffs' reversionary interest, or in trespass.

Semble, that it was in trespass; but *Held*, that it disclosed a good cause of action.

THIS was an action for the recovery of damages.

The declaration alleged that one James B. Rolls was the owner of an estate in fee simple, of and in the north west quarter of lot 3, in the 4th concession of Blandford, and being such owner became indebted to the plaintiffs in the sum of $1350: that in order to secure payment of the said money and interest the said James B. Rolls by indenture, dated 12th November, 1873, duly registered and made by him in pursuance of the Act respecting short

forms of mortgages, did mortgage the said land to the plaintiffs forever, subject to a proviso for redemption on the payment of the principal money and interest as follows: $150 on the 12th of November, 1874, and the remainder in six yearly payments of $200 each on the 12th of November in each year thereafter, with interest. And it was provided in and by the mortgage that neither the said James B. Rolls nor his representatives or assigns should, without the written consent of the plaintiffs, cut down, remove, or dispose of any standing timber, or timber trees growing or being on the said lands, except what might be necessary for the uses thereof, until the first four payments of principal above mentioned, together with interest on $1350 up to 12th November, 1877, should have been first paid; and that if default should at any time be made in any of the payments of interest above mentioned, then the whole principal money should forthwith become due in like manner, and with the like consequences, as if the time for the payment of the principal money had fully come and expired; and that under and by virtue of the indenture the said James B. Rolls became a tenant of the land to the plaintiff until he should make default, and after such default held as a tenant at sufferance to the plaintiffs. That on the 12th of November, 1874, there was default in payment of the principal money and interest payable on that day; and that the defendants well knowing the premises, but contriving and intending to injure, prejudice and aggrieve the plaintiffs in their ownership of the land and the trees and timber thereon, after default had been made, and before suit, wrongfully, and unjustly, and without the license, and against the will of the plaintiffs, entered on the said land and there cut down, cut up and removed divers of the timber and trees growing and being on the land, and thereby injured the land and impaired the value thereof, so as to make the said land an insufficient security to the plaintiffs for the repayment of the mortgage debt and interest.

There was also a count in trover for the conversion of trees of the plaintiffs.

The pleas were:

1. To the whole declaration: not guilty.

To the first count: leave and license of Rolls before 12th November, 1874.

3. To the first count: a sale of the timber by Rolls to the defendants, for a valuable consideration, while Rolls was in possession as tenant, alleged subsequent cutting and removal of the same.

4. To the first count: that while Rolls was the owner in fee, in possession of the land, he entered into an agreement with the defendants for the sale of certain timber, which they afterwards cut and removed.

5. To the second count: denial of property in the plaintiffs.

Issue.

The cause was tried before Gwynne, J., at the Spring Assizes for 1875, at Woodstock.

The land covered by the mortgage had at one time belonged to George Mann, one of the plaintiffs. He on the 12th of November, 1873, by deed of that date conveyed the land to James B. Rolls for $1500, taking back a mortgage. Rolls paid $150 on account of the purchase money, and gave a mortgage to secure the balance of $1350.

The mortgage from Rolls to the plaintiffs was made in pursuance of the Act respecting short forms of mortgages. It corresponded with the description of it contained in the declaration, and contained the ordinary proviso, "that until default of payment the mortgagor shall have quiet possession of the said lands." It also contained the covenant not to cut timber as set out in the declaration. It was registered on the 20th November, 1873.

Default was made in the payment of the principal and interest payable on 12th November, 1874.

When the mortgage was made there were about 25 acres of standing timber on the land. The land covered by the mortgage contained 50 acres.

During the last two days of December, 1874, and on New Years day, 1875, the timber, being nearly all the timber on the 25 acres, was cut and removed.

This was done without the knowledge or consent of the plaintiffs.

It was done in great haste by the defendant Albert English, assisted by the co-defendant Thomas English, who was his father.

Albert English had, it was said, purchased the timber from Rolls or his brother-in-law sometime in the Fall of 1874. Rolls agreed to help English to cut and remove the timber but did not do so. It was taken off by English when Rolls was away from the place.

English swore that he did not know of the mortgage to the plaintiffs, and that Gideon Mann, one of the plaintiffs, represented that he had sold the place to Rolls for cash. This was denied by Gideon Mann, and there were other circumstances to shew that English either suspected or had good reason to suspect that Rolls had no power to sell the timber.

The learned Judge, reserving to himself the entry of the verdict, directed the jury to answer the following questions:

1. What is the amount of damage done to the place by the cutting down and removing by the defendants, or either of them, of the timber cut down in December and January last, and by the manner in which it was cut?

2. Did the defendants, or either of them, actually and in good faith contract with Rolls and purchase from him the timber so cut, believing Rolls to be entitled to sell it to him.

3. Was the timber cut down by Rolls himself, Albert English aiding him with a view to enable Rolls to convert the timber into money, and to leave the place in a depreciated condition by stripping it of the timber?

The jury answered "$150" to the first, "He did not," to the second, and "Yes," to the third question.

The learned Judge thereupon recorded a verdict against both defendants for $150.

After the learned Judge had recorded the verdict, counsel for the defendants asked if the jury found the defendants guilty. They said not. But the learned Judge said

he recorded the verdict upon the answers of the jury to the questions, holding that if one of the defendants was liable, the other also was a wrong-doer who could not excuse himself upon the ground of being employed by the other.

During Easter term, May 22, 1875, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiffs to shew cause why a nonsuit should not be entered, pursuant to leave reserved at the trial, or why a new trial should not be had on behalf of both of the defendants, or of the defendant Thomas English, the jury having said they did not intend to find a verdict against him, and the answers of the jury to the questions put to them not warranting the entry of a verdict against the defendant Thomas English, and on grounds disclosed in affidavits and papers filed.

The affidavits shewed what took place at the trial immediately after the recording of the verdict, and substantially agreed with the notes of the learned Judge.

In this term, February 9, 1876, *F. Osler* shewed cause. He argued that the action was maintainable under the Administration of Justice Act. He cited *McLeod* v. *Mercer*, 6 C. P. 197; 2 *Waterman* on Trespass, secs. 840, 777; 1 *Powell* on Mortgages, 6th ed. 157 note; *Birch* v. *Wright*, 1 T. R. 378, 383; *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 183; *Partridge* v. *Bere*, 5 B. & Al. 604; *Doe d. Fisher* v. *Giles*, 5 Bing. 426; *Lewis Bowles's Case*, Tudor's Real Property Cases, 2nd ed. 93; *Whitfield* v. *Bewit*, 2 P. Wms. 240; Ib. sub. nom., *Bewick* v. *Whitfield*, 3 P. Wms. 267; *Farrant* v. *Thompson*, 5 B. & Al. 826; *Meyers* v. *Marsh*, 2 U. C. R. 148; *Mason* v. *Carpenter*, 13 Grant 320.

McMichael, Q. C., contra The verdict was not, under any circumstances, maintainable against the defendant Thomas English, and it was not in law maintainable against both defendants, the plaintiffs' only remedy being against the mortgagor under the covenants contained in the mortgage. He cited *Street* v. *Crooks*, 6 C. P. 124; *Dundas* v. *Arthur*, 14 U. C. R. 521; *Wafer* v. *Taylor*, 9 U. C. R 609; *King* v. *Smith*, 2 Hare 239.

March 17, 1876. HARRISON, C. J.—It is now provided that for the purposes of carrying into effect the objects of the Administration of Justice Act, and "for causing complete and final justice to be done in all matters in question in any action at law, the Court or a Judge thereof, according to the circumstances of the case, may at the trial or at any other stage of an action or other proceeding, pronounce such judgment, or make such order or decree as the equitable rights of the parties respectively require, * * * and may as fully dispose of the rights and matters in question as a Court of equity could do:" Sec. 8 of 36 Vic., ch. 8, O.

It is the duty of a Court of law, in a proper case, rather than turn the plaintiff out of Court, where his rights are merely equitable, to make such order or decree as the equitable rights of the parties require: *Boulton* v. *Hugel*, 35 U. C. R. 402.

If the plaintiffs in this action have a right to sue defendants or either of them, either at law or in equity, upon the facts disclosed in the evidence and found by the jury, the particular form of their action or suit is a matter only of secondary importance.

The important question which arises is, as to the plaintiffs' right in any form to sue these defendants, or either of them, either at law or in equity.

Courts of law at one time construed the conveyance of land by mortgage as a conveyance of the legal estate, leaving the mortgagor no right except that of regaining the estate on performance of the condition. Courts of equity, on the contrary, treated the mortgage as a mere security for the debt, and held that the debt was the principal and the land the incident: 1 *Powell* on Mortgages, 6th ed. 157, note; *Pollock's* Principles of Contract, 416.

But Courts of equity have refused to permit a mortgagor to do any acts injurious to or diminishing the security, and have, where the security was likely to be made scant, restrained the mortgagor from attempts to commit waste: *Robinson* v. *Litton*, 3 Atk. 209; *Humphreys* v. *Harrison*,

1 Jac. & Walk. 581. See *Taylor's* Eq. Jur., sec. 820. 2 *Story's* Eq. Jur., 10th ed., sec. 1016.

A mortgagor has, in general, no right to cut timber upon the mortgaged estate, except perhaps for purposes of fuel and fencing, and if he do so without right, he will be restrained by injunction where it appears that his conduct, if permitted, would be injurious to the security of the mortgagee and make the security scant : *King* v. *Smith*, 2 Hare 239, 242 ; *Hippesley* v. *Spencer*, 5 Madd. 422 ; *Wafer* v. *Taylor*, 9 U. C. R. 609 ; *Russ* v. *Mills*, 7 Grant 145 ; *Wason* v. *Carpenter*, 13 Grant 329 ; *Cawthra* v. *Maguire*, 5 U. C. L. J. 142.

The mortgagor is not, unless there be some special agreement to that effect, entitled of right to the possession of the land mortgaged. But he holds it solely at the will and by the permission of the mortgagee, who may at any time, by an ejectment, without giving any prior notice, recover the same against him or his tenants. In this respect, the estate of the mortgagor is inferior to that of a tenant at will. But so long as he continues in possession by the permission of the mortgagee, he is entitled to take the rents and profits in his own right, without any account whatsoever therefor to the mortgagee. Indeed, for most purposes, except where the interest of the mortgagee is concerned, the mortgagor is treated as the substantial owner of the estate. He will not, however, be permitted to do any acts injurious to or diminishing the security of the mortgagee, and if he should commit, or attempt to commit, acts of waste, he will be restrained therefrom by the process of injunction : 2 *Story's* Eq. Jur., 10th ed., sec. 1017.

Upon the execution of the conveyance by which the mortgage is created the legal freehold and inheritance, or the legal estate for the term of years, created by the mortgage becomes immediately vested in the mortgagee, subject to the condition or proviso for redemption. But the actual occupation and possession of the land is now never given to the mortgagee. On the contrary, a clause is usually inserted in the mortgage that *until default* is made in the

payment of the mortgage money, or of the interest, the mortgagor shall retain the possession: 1 *Powell* on Mortgages, 6th ed. 157*a*.

If default arise the mortgagee has a right, without demand of possession or notice to quit, to take immediate and actual possession: *Birch* v. *Wright*, 1 T. R. 378; *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 183; *Partridge* v. *Bere*, 5 B. & Al. 604; *Doe d. Barker* v. *Crosby*, 7 U. C. R. 202; *Sidey* v. *Hardcastle*, 11 U. C. R. 162; *Dundas* v. *Arthur*, 14 U. C. R. 521; *Rogers* v. *Grazebrook*, 8 Q. B. 895.

"We must look at the covenant he (the mortgagor) has made with the mortgagee to ascertain what his real situation is. We find from the deed between the parties, that the possession of his estate is secured to him until a certain day, and that if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee. And there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term": per Best, C. J., in *Doe Fisher* v. *Giles*, 5 Bing. 421, 427.

This was held to be the law, even in a case where the mortgage provided that the mortgagor might have for the recovery of interest the same powers of entry and distress as a landlord, and where the mortgagor attorned for that purpose as a tenant from year to year to the mortgagee: *Metropolitan Assurance Co.* v. *Brown*, 28 L. J. Ex. 340, 1859.

All that is left in the mortgagor after default is a mere equity of redemption. This is said to be an "estate." It is by a figure of speech only that it is called an estate; but it is a misapplication of words so to call it: *Paget* v. *Ede*, 30 L. T. N. S. 229, V. C. Bacon, 1874.

The cases so far establish that in an ordinary case of mortgagor and mortgagee the mortgagor after default has no right to cut or remove timber off the land mortgaged so as to diminish the security to the prejudice of the mort-

gagee, and, therefore, that his doing so is a wrong to the mortgagor.

Much more ought this to be the law where the mortgage, as here, in express language provides that the mortgagor, his heirs, executors, administrators or assigns, shall not, nor will, cut down, remove, or dispose of any timber or timber trees now growing or being on the said lands, except what may be necessary for the uses thereof, until after four of the payments hereinbefore mentioned, with the interest payable therewith, shall have been paid.

In this case it was proved that the requisite payments had not been made, so that the mortgagee at the time of the cutting and removing of the timber had the right to the actual possession of the land without notice or demand of any kind.

If the timber, under these circumstances, had been cut and removed by the mortgagor, his conduct would not only have been a wrong to the mortgagee but a direct breach of his covenant.

It is argued that in such a case the only remedy of the mortgagee is against the mortgagor on the covenant. I do not think so. This is only one remedy, and in the case of a worthless mortgagor may be a very inadequate remedy. The property in the timber is, by the conveyance, the property of the mortgagee. If there were no proviso for entry until default, the mortgagee would have the right to immediate possession. After default the mortgagee has the right to immediate and actual possession.

If we were to hold, under these circumstances, that a mortgagee had no remedy other than on the covenant against persons wrongfully cutting timber off the mortgaged land, our decision would be a reproach to the administration of justice.

The injury done to the mortgagee is one done to him in respect of his property. For that injury, although he may or may not have a remedy by contract, he must, I think, have a remedy independently of contract.

The remedy must be one against the wrongdoer, whether

the mortgagor or a person or persons acting with or without him, or acting with or without his fancied permission, for real permission he could give none.

Trespass or any other action for interference with the immediate enjoyment of land, it is said, must be brought by a person who is actually or constructively (*i.e.*, by means of servants or agents, &c.,) in possession; in other words, that the mere right to possession will not support an action for trespass to land. See also *Wheeler* v. *Montefiore*, 2 Q. B. 133; *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932; *Litchfield* v. *Ready*, 5 Ex. 939; *Dawson* v. *Johnson*, 1 F. & F. 656; *Barnett* v. *Guildford*, 11 Ex. 19. See also *Dicey* on Parties to Action, 337.

The constructive possession may fairly be said to exist either where the land is in a state of nature or where the possession of the person in actual possession can be said to be really the possession of the owner of the freehold. *Heck* v. *Knapp*, 20 U. C. R. 360; *Casselman* v. *Hersey*, 32 U. C. R. 333.

In *Dicey*, p. 338, it is also said "No one, whatever his title or interest in land, can bring an action of trespass before entry, *i. e.* before he has obtained possession. It cannot, therefore, be maintained by a person who has purchased an interest in land, nor by a mortgagee not in possession, nor by a devisee, a lessee, an assignee, or an executor or administrator, before entry."

In the note *n*, it is said, quoting from *Lush's* Prac., 3rd ed., 151, "The fact that the mortgagee not in possession cannot bring trespass deserves notice, since from the rule that no action can be brought except for the infringement of a common law right, it might, perhaps, be erroneously inferred that the mortgagee, who is the legal owner of the land and not the mortgagor, was the right person to sue for all injuries to the land; the reason, of course, why the mortgagee who is not in possession cannot bring trespass, whilst the mortgagor who is can, is, that the action depends not upon the ownership but upon the possession of land, and that therefore the mortgagor, and not the mortgagee, is the person by whom it can be brought."

It has, however, been held that where trees are excepted in a lease the lessor may maintain trespass *quare clausum fregit*, against any one who cuts them down, for by the exception of the trees the close on which they grow is also excepted: *Ashmead* v. *Ranger*, 1 Ld. Raym. 551; *Rolls* v. *Rock*, 2 Selw. N. P. 13th ed., 1244. So if a lessee at will commits voluntary waste the lessor may maintain trespass against him, for the committing of the waste amounts to a determination of the will: *Co.* Litt. 57 *a*; *Shrewsbury's Case*, 5 Rep. 13 b, and there are authorities to shew that where land is let to a lessee at will and a trespass is done upon the land, both the lessor and lessee may maintain trespass: Per Holroyd J., in *Harper* v. *Charsworth*, 4 B. & C. 583. See also *Com.* Dig. "Trespass," B. 2; *Geary* v. *Barecraft*, 1 Sid. 346; 2 Rolle 651, N. pl. 6.

If it were necessary to hold that trespass was maintainable in this case, I should, considering the terms of the mortgage, the default which arose thereunder, and the relation in which the parties thereafter stood to each other, be inclined to hold that trespass was maintainable.

But as there is a count in trover it is really unnecessary to decide the point. All that is necessary to maintain trover is, the right of property and right of immediate possession: *Dicey* on Parties, 346, 347.

The timber when severed from the freehold without the consent of the mortgagee and against his will became and was the property of the mortgagee or the owner of the freehold: *McLaren* v. *Ryan*, 36 U. C. R. 307.

When the trees are cut and severed from the soil they are no longer part of the freehold but are merely goods and chattels, and the owner of the land may sue in respect of the taking of the trees, though he does not choose to complain of the nominal damage done to him by the breaking and entry upon his land: Per Wilson, J., in *McLaren* v. *Ryan*, 36 U. C. R. 312.

It seems a waste of time, where there is a wrong to be redressed and a right to be enforced, in this age of law

reform, to discuss at length the mere remedy, but until the Legislature go much further than it has gone in this Province, such discussions cannot well be avoided.

In Massachusetts, by force and effect of the mortgage, the legal estate at once vests in the mortgagee, and as between the parties to the mortgage the right of possession also immediately passes to the mortgagee, unless he has stipulated for the continuance in possession of the mortgagee until condition broken. In either case after condition broken the mortgagee's right to immediate possession accrues, and as between these parties it carries with it the incidents of a right to sue in trespass for any injury to the freehold by strip and waste in cutting down valuable timber trees : Per Dewey, J., in *Page* v. *Robinson*, 10 Cush. 99. It is now the incorporated statute law of the State : 2 *Waterman* on Trespass, sec. 776. See also sec. 840.

This has also long been the doctrine in the State of Maine : *Stowell* v. *Pike*, 2 Maine 387 ; *Smith* v. *Goodwin*, 2 Maine 173 ; *Bussey* v. *Page*, 14 Maine 132 ; *Frothingham* v. *Mactavish*, 24 Maine 403.

Such also is the law in the State of New Hampshire : *Pettingill* v. *Evans*, 5 N. H. 54 ; *Smith* v. *Moore*, 11 N. H. 55 ; *Sanders* v. *Reed*, 12 N. H. 558.

And I must say, considering the condition of our country as compared with England, it would be much more reasonable law for us than the contrary, which is assumed to be English law.

The mortgagee, who has undeniably the legal estate, and who has undeniably the right to immediate possession, although the mortgagor have the actual possession, should be so far deemed in possession as not merely to protect the property from spoliation but to recover damages for the spoliation from the wrong doer.

The nearest Canadian authority to the present case in principle that I have been able to find is *McLeod* v. *Mercer* 6 C. P. 197, cited by Mr. Osler. The declaration, like the first count here, was special. It stated that the plaintiff was the owner of two horses and 21,102 feet of lumber as

mortgagee, the right to possession of which goods for a certain time to come was in T. J. E. and J. E. the mortgagors, and the said goods were then in the possession of the said T. J. E. and J. E. Yet defendant, well knowing, &c., whilst plaintiff was so owner, and whilst the right of possession and the possession was so in T. J. E. and J. E., on, &c., seized and took the said goods.

Draper, C.J., in delivering judgment on the demurrer, said, p. 197 : " That a mortgagee may treat the mortgagor as rightfully in possession and himself as reversioner is recognized by Lord Denman, in *Doe* v. *Barton*, 11 A. & E. 314 ; see also *Doe* v. *Day*, 2 Q. B. 147. The cases of *Partridge* v. *Bere*, 5 B. & A. 604, and *Hitchman* v. *Walton*, 4 M. & W. 409 establish this. The declaration, so far, therefore, sets forth *primâ facie*, a sufficient reversionary interest in the plaintiff against a mere wrong doer. The plaintiff asserts title in himself, while he also shews another person rightly in possession as mortgagor. Whether that right was one to expire by mere flux of time, or by the happening of some default, the plaintiff equally shews that he will have the right to possession when one or other event puts an end to the temporary right of the mortgagor, so that I think the declaration sufficiently states the plaintiff's present title or right of property, and that the right of possession is temporarily in some one else. That under these circumstances he cannot maintain trespass needs no authority to establish, for he admits he is out of possession ; and the authorities cited by Mr. Robinson prove he cannot maintain trover, for though he has the right of property, he shews that he has not the immediate right of possession, and as the mortgagors do not in any way appear to be parties to the defendant's wrongful act, these cases do not apply. The plaintiff then, it appears to me, can only bring this action for the injury to his reversionary interest * * I think the declaration good on demurrer against all the objections taken."

The first count of the declaration here, while it shews title in the plaintiffs and immediate right to the possession

of the land, does not shew actual possession of the land in the plaintiffs at the time of the alleged injury, and so strictly speaking is not to be looked upon as a count in trespass to the realty. Nor does it shew that at the time of the alleged injury the mortgagor had the right to the possession, so that it is doubtful if it can be looked upon as a count in case for injury to the supposed reversionary interest of the plaintiff. I incline to the opinion, for reasons already given, that it is a good count in trespass: see *Hatch* v. *Holland*, 28 U. C. R. 213. But whether it is to be looked upon as trespass or case it was proved at the trial, and this of itself, without more, is a sufficient answer to a motion for a nonsuit or a new trial.

If a declaration is bad the plaintiff cannot be nonsuited on the ground that the facts alleged do not disclose a cause of action: *Lumby* v. *Allday*, 1 C. & J. 301; *Commercial Bank of Canada* v. *Harris*, 27 U. C. R. 526.

The proper motion in such a case, where there is only one count in the declaration, is a rule to arrest the judgment, or where several counts and one bad, for a *venire de novo*: *Stephens* v. *Stephens*, 24 C. P. 424. No such rule was asked in this case. No such rule would have been granted if asked. And no such rule would, I think, have been made absolute even if granted.

The mere fact that no precedent can be found in support of the first count of the declaration is not of itself proof that the action is not maintainable: see *Little* v. *Ince*, 3 C. P. 528. The maxim of the English law is, to amplify its remedies, and without usurping jurisdiction to apply its rules to the advancement of substantial justice: per Wilson, J., in *Barned's Banking Co., limited*, v. *Reynolds*, 36 U. C. R. 256, 279.

It appears to me that the first count discloses a good cause of action, and that whether it does or not the evidence sustains the second count, which is for trover.

The only remaining question is, whether there should be a new trial or other order as regards the defendant Thomas English. He was not in the eye of the law less a wrong-

doer because he was hired or employed by his co-defendant to do what he did. There is abundant evidence to sustain the verdict as against his co-defendant and against him.

The question is, whether the verdict is correctly recorded against him.

The jury were not asked to find a verdict. The learned Judge directed the jury to answer certain questions of fact, which he stated to them. In such a case it is declared by sec. 32 of 37 Vic. ch. 7, that the jury shall answer the questions "and shall not give any verdict," and that on the finding of the jury upon the questions which they answer "the Judge shall enter the verdict." It is by the same section provided that "the verdict so entered, unless moved against, shall stand and be effectual as if the same had been the verdict of the jury."

The verdict here is the verdict of the Judge, and not of the jury. The learned Judge reports that "he recorded the verdict upon the answers of the jury to the questions, holding that if one of the defendants was liable the other also was a wrong-doer, who could not excuse himself on the ground of being employed by the other."

We do not think that this verdict of the Judge should be set aside. It is fully warranted both on the law and evidence. It is a verdict that a jury, not understanding the law as to joint *tort-feasors,* might not render. It is a verdict which any Judge on the finding would and ought to render. It is a good illustration of the wisdom of the enactment which enables the Judge in certain cases to make jurors as it were assessors to find facts on doubtful or contradictory testimony, reserving the ultimate disposal of the verdict on the facts so found and law applicable thereto to the Judge.

I think the verdict was, under the circumstances, properly recorded by the Judge against both defendants.

The rule must be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

LAWRIE V. RATHBUN ET AL.

Registry law—Omission to index deed—29 Vic. c. 24—Confusion of property.

The plaintiff claimed lot 25 under a deed from the heirs at law of S., the patentee, executed in 1875. Defendants claimed under a deed from S. dated and, registered in 1867, but the registrar had omitted to enter defendants' deed in the abstract index, and in consequence, when the plaintiff enquired at the registry office before taking his deed, he was told that the patentee had made no conveyance. *Held*, under 29 Vic. c. 24, D., that the registrar's omission did not invalidate the registration, or deprive defendants' deed of its priority.

The divisions of a statute, under which the clauses are arranged and classified, may be looked to as affording a key to the construction.

The plaintiff had cut timber on lot 24, which was his, and on lot 25, believing that he owned both lots; and all had been drawn away together by him to a lake about three miles distant. Defendants' agent took away a quantity, which had been cut on both lots, being forbidden by the plaintiff, who swore that he could have distinguished the timber cut on each lot by the marks, and told defendants' agent so, but that the agent said he would take it, no matter where it came from. *Held*, in the Court of Queen's Bench that defendants were liable in trespass for the timber cut on lot 24.

The authorities as to confusion of property reviewed.

On appeal this decision was reversed, and the defendant held not liable, on the ground that the plaintiff was a wrongdoer in taking the timber from lot 25, though under the belief that it was his own: that upon the evidence, fully stated in the judgments, there was a confusion of property of substantially the same quality and value which *prima facie* entitled defendant to take out of it his own proportion; and that if the plaintiff could distinguish his own from the defendant's, it was his duty to point it out, or offer to point it out to defendants, which he had not done, or shewn a sufficient excuse for omitting.

Per PATTERSON, J., the Legislature did not by the 33 Vic. ch. 7, sec. 6, O., intend the Court to decide upon the evidence questions not discussed before or decided by the Judge at the trial.

THE first count was trespass *de bonis* as to 500 pieces of pine timber.

The second count was *detinue* for 500 pieces of timber.

The third count was trespass *quare clausum fregit*, as to lot 24 in the 11th concession of Hinchinbrooke.

The fourth count was trespass *quare clausum fregit*, as to lot 25 in the same concession.

The remaining counts were the common *indebitatus* counts for goods sold and delivered, &c.

The pleas were:

1. To the first count, (except as to three sticks of pine timber), not guilty.

2. To the second count, (with the like exception), not possessed.

3. To the second count, (with the like exception), not guilty.

4. To the second count, (with the like exception), not possessed.

5. To the third count, not guilty.

6. To the fourth count, not guilty.

7. To the fourth count, not possessed.

8. To the fourth count, *liberum tenementum.*

9. To the remaining counts, *nunquam indebitati.*

10. To the same, Payment.

11. To the same, Set-off.

12. Payment into Court of $20 as to the portions excepted from the pleas to the first and second counts.

The plaintiff joined issue on the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth pleas.

Replications to the eleventh plea: 1. *Nunquam indebitatus.*

2. Payment.

Replication to the 12th plea: damages *ultra.*

The cause was tried before Galt, J., at the last Fall Assizes, at Kingston.

The learned Judge, under the statute, dispensed with the jury.

The plaintiff was a lumberer. In the winter of 1874–75 he was lumbering on lots 24 and 25 in the 11th concession of Hinchinbrooke. He took 480 pieces of white pine timber off the lots, and drew them to Long Lake in the township of Olden, about three miles from where they were cut. The timber was marked "R." Defendants sent a number of teams and drew away 185 pieces, of the value of $1,102.25 —each piece averaging 45 feet. The value at the place where they were taken was thirteen cents a foot. Plaintiff forbad defendants' agent from touching the timber, but notwithstanding he took it.

The plaintiff bought the west half of lot 24 and lot 25, and took the title to James Gibb Ross, of Quebec, in order to secure Mr. Ross for advances.

The patentee of the Crown of lot 25 in the 11th concession of Hinchinbrooke, was Jacob Sager. The patent was dated 4th April, 1865. He died intestate. On 13th January, 1875, his heirs-at-law, by deed of that date, conveyed the lot to Mr. Ross for the plaintiff.

The plaintiff did not know till February, 1875, that defendants made or had any claim to the lot. All the timber cut on lot 25 had, with the exception of forty pieces, been cut and drawn away at that time. These forty pieces were still on the lot. All the timber cut on the two lots which which had been removed was indiscriminately lying together at the Long Lake. Defendants made no claim to lot 24.

The defendants, by their agent, drew away timber which had been cut on 24 as well as 25. The plaintiff warned him at the time, but did not point out the difference. He was not asked to do so. He said he could have done so if asked, but defendants' agent said he did not care where the timber came from, that he would take it. Plaintiff said he knew the difference because of the shape of the *R.* The *R.* on timber cut on lot 24 differed, he said, in shape from the *R.* on timber cut on lot 25.

The defendants claimed lot 25 under a deed from Jacob Sager, the patentee, dated 3rd July, 1867, registered 10th July, 1867.

The registrar at the time omitted to put the number in the abstract index of his office, and in consequence, when the plaintiff made enquiry before he took his deed from the heirs-at-law of the patentee, he was told by the then registrar that the patentee had not made any conveyance of the lot.

It was contended by counsel for the plaintiff that the deed under which plaintiff claimed was entitled to priority over the deed to the defendants.

The learned Judge overruled the contention, and found that the defendants were owners of lot 25 in the 11th concession of Hinchinbrooke.

He found also that the plaintiff did cut the sticks of timber

which were afterwards drawn away by defendants from Long Lake, and that the same, with the exception of 51, were cut on lot 25. He found that the 51 had been cut on lot 24.

He thereupon entered a verdict for the plaintiff for $250, reserving leave to defendants to move to enter a verdict for them, if the Court upon all the evidence should think the defendants entitled to the verdict.

Bell, Q. C., for the defendants, during last term, November 16, 1875, obtained a rule to enter a nonsuit or verdict for defendants, pursuant to leave reserved at the trial, and pursuant to the Administration of Justice Act.

Britton, for the plaintiff, during the same term, November 18, 1875, obtained a rule calling on the plaintiff to shew cause why the verdict should not be increased, pursuant to the Law Reform Act, to such an amount as should include the value of the timber taken by defendants from the plaintiff even if cut on lot 25; or why, if the proper amount cannot be ascertained from the evidence, a new trial should not be granted between the parties, on the ground that the plaintiff proved title to lot 25, and that the deed from the heirs of Jacob Sager, under which the plaintiff claimed, was entitled to priority over the deed under which the defendants claimed, by reason of the non-registration or insufficient registration of the last mentioned deed.

Both rules were argued together during this term, February 19, 1876.

Bell, Q. C., for the defendants. The defendants' deed was sufficiently registered to entitle it to preserve its priority: 29 Vic., ch. 24, secs. 20, 28, 30, 35, 53, 54, 64, 68, sub.-secs. 2 and 3; and as the plaintiff had taken defendants' timber off lot 25 and mixed it with his own cut on lot 24, defendants were entitled to take an equal quantity to that removed from 25, whether cut on lot 24 or lot 25: *Blades* v. *Higgs*, 10 C. B. N. S. 713, 720; *Browne's* Civil Law, 2nd ed., 243; *Waterman* on Trespass, secs. 405, 406, 407, 408; *Lupton* v. *White*, 15 Ves. 432, 441; 2 *Black.* Com., 404; 3 *Stephen's* Com., 7th ed., 23; *Story* on Bailments, 8th ed.,

sec. 40; *Spence* v. *Union Marine Ins. Co.*, L. R. 3 C. P., 427, 438; *Bryant* v. *Ware*, 30 Maine 295; *Loomis* v. *Green*, 7 Maine 386; *Stevenson* v. *Little*, 10 Mich. 433; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62; and defendants counted the stumps on their lot 25, and only took a sufficient quantity of timber to correspond with the stumps, which they had a right to do.

Britton, for plaintiff, contra. Defendants' deed was under the Registry Act entitled to priority: 29 Vic., ch. 24, secs; 62, 65, 28. At all events, what the plaintiff did he did innocently under a supposed right, and therefore there was no wilful or wrongful admixture: *Spence* v. *Union Marine Ins. Co.*, L. R. 3 C. P. 427; *Gilmour* v. *Buck*, 24 C. P. 187; *Sills* v. *Hunt*, 16 U. C. R. 521. Defendants acted with a high hand and took the timber entirely at their own risk: *Addison* on Torts, 4th ed. 322; *In re Coleman*, 35 U. C. R. 559.

March 17, 1876. HARRISON, C. J. The first question for decision is, whether defendants' deed, by reason of the alleged insufficiency of registration, has lost its priority.

It was duly entered in the proper book for the township. On the back of it was endorsed a certificate that it had been duly recorded. All that the Registrar at the time time omitted was, to enter the number of the memorial, the names of the grantor, and the name of the grantee in the "Alphabetical Index."

It is argued by plaintiff's counsel that compliance with section 29 of 29 Vic. ch. 24, is essential to valid registration, and therefore that the omission to do what the section requires avoids the registry.

There is nothing in the section which would compel us to give it an interpretation so unreasonable and so unjust, but it is argued that looking at the whole scope of the Act we must give that effect to the section whether reasonable or just.

The Act professes to be a consolidation of the law as to registrars, registry offices, and the registration of instruments relating to lands in Upper Canada. It is carefully

subdivided under the following headings: registry offices, registrar—duties of registrars—books of office—instruments that may be registered—how registered—proof for registration—manner of the registering—effect of registering or omitting to register—fees of registrars—and miscellaaneous provisions.

The section relied on by the plaintiff as avoiding the registry is under the heading "books of office," and not under the heading "manner of the registering."

The marginal notes to a section of a statute in the copy printed by the Queen's Printer when not appearing on the rolls of Parliament, forms no part of the statute itself, and is not binding as an explanation or construction of the section, though useful as a guide to a hasty enquirer. See *Claydon* v. *Green*, L. R. 3. C. P. 511; see also *Barrow* v. *Wadkin*, 24 Beav. 327; *In re Venour's Settled Estates*, L. R. 2 Ch. D. 523.

But this does not apply to the divisions of an Act of Parliament which is skilfully and designedly framed according to the divisions, having the headings of the divisions as parts of the Act itself.

These various headings are not to be treated as if they were marginal notes. They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to to explain its enactments, but as affording, as it appears to me, a better key to the construction of the sections which follow than might be afforded by a mere preamble: per Channell, B., in *Eastern Counties R. W. Co.* v. *Marriage*, 9 H. L. 41. See also the language of Lord Wensleydale at p. 68 of the same case. See further *Hammersmith & City R. W. Co.* v. *Brand*, L. R. 4 H. L. 171; *In re Kinnear and The Corporation of the County of Haldimand*, 30 U. C. R. 398; *Regina* v. *Currie*, 31 U. C. R. 582.

When we turn to the sections under the heading "Effect of Registering or Omitting to Register," we find it declared, by section 62, that after any grant from the Crown of

lands in Upper Canada, and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in such grant shall be adjudged to be fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, "unless such instrument is registered *in the manner herein directed* before the registering of the instrument under which such subsequent purchaser or mortgagee may claim."

When we turn to the sections under the heading "Manner of Registering," we find it, in section 53, declared that the registrar or deputy registrar of the county in which the lands are situate shall upon production of the original instrument, counterpart, duplicate, or other original instrument, together with an affidavit of execution, do certain things, viz.:

1. Enter the said instrument in the registry book in the order in which it is received.
2. File the same with such affidavit of execution.
3. Endorse a certificate on every such instrument.
4. Mention in the certificate the certain year, month, day, hour, and minute, in which such instrument *is entered and registered*, expressing also in what book the same has been entered and the number of the registration.
5. Sign the certificate when so endorsed.

The section imposes certain duties on the registrar or his deputy, contingent "upon production to him of the original instrument, duplicate, or other original part thereof, together with an affidavit of execution."

These duties are of two classes: Those that relate to the registry, and those which are to follow registration, and are designed to evidence it.

The first two requisites which I have mentioned strictly relate to the former class of duties, and are paramount; the three last to the latter class of duties, and are subordinate.

In addition to these last mentioned duties there are duties of a still more subordinate character mentioned in the Act. Among these latter I class the duty to keep an

alphabetical index and make entries therein. The object of the index is plain. It presupposes registration, and is designed to facilitate reference to the registration. It would be trifling with common sense to hold that the omission of such a duty avoids a registration. It might, with equal propriety, be argued that there can be no book without an index, or that the omission to provide an index proves that the book does not exist.

Cases in which it has been held that a registration defective on the face of it is in effect no registration are distinguishable: See *Harding* v. *Cary*, 10 Ir. C. L. R. 140; *Robson* v. *Waddell*, 24 U. C. R. 574. If the instrument be received by the registrar and entered in the register book and filed in the office it is to be deemed registered, although there may be some defect in the affidavit or other proof for registry: *Magrath* v. *Todd*, 26 U. C. R. 87; see also *Regina* v. *The Registrar, &c., for Middlesex*, 15 Q. B. 976; *Jones* v. *Cowden*, 34 U. C. R. 345; 36 Vic., ch. 17, sec. 6 O. So I think, on the same principle, the instrument must be deemed registered, although the registrar or his deputy afterwards omit to index it in the alphabetical index.

A registrar who omits a duty to the prejudice of any person procuring information from him may be liable to an action for damages: see *Harrison* v. *Brega*, 20 U. C. R. 324; but it would be against reason to hold that the registration is defective merely because the registrar omits to index it or mention it to persons making enquiries in reference to a particular parcel of land.

The plaintiff's rule must therefore be discharged.

Then as to the defendants' rule. The defendants' counsel contends that their agent had a right to take their timber wherever he could find it, using no unnecessary violence for the purpose, and cites *Blades* v. *Higges*, 10 C. B. N. S. 713, to sustain his contention. The plaintiff's counsel admits this contention, but denies the right of the *defendants* to take *plaintiff's* timber, merely because before or at the time of the taking it happened to be mixed with the timber of the defendants.

This is the great point in controversy between the parties, and this is the point which we must now determine on the defendants' rule.

Few subjects in law are less familiar or more obscure than that which relates to the confusion of property: per Morton, J., in *Ryder* v. *Hathaway*, 21 Pick. 299.

In endeavouring to arrive at a conclusion we should be guided by any direct authority as well as by analogous cases in our own law, and by the principles of law which have been laid down and established in our Courts; and as the rules and principles of our mercantile and maritime law are in a large measure derived from foreign sources, we gladly avail ourselves of the codes and laws of other countries, and especially of the Roman Civil Law, to see what among civilized nations has usually in like cases been considered reasonable and just: per Bovill, C. J., in *Spence* v. *Union Marine Ins. Co.*, L. R. 3 C. P. 427, 437.

If goods of different persons are so mingled that they cannot be separated, there is what in law is denominated confusion of property.

In the case of confusion of property, where the goods of two persons are so intermixed that the several portions can no longer be distinguished, the English law partly agrees with, and partly differs from the Civil. If the intermixture be by consent I apprehend that in both laws the proprietors have an interest in common in proportion to their respective shares. But if one wilfully intermixes his money, or corn, or hay, with that of another man without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the Civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property without any account to him whose original dominion is invaded and endeavoured to be rendered uncertain without his consent: 2 *Black.* Com., 3rd ed., 405.

The rule of the Civil law would enable one person to

acquire the property of another against his will, and no doubt went upon the ground that the intermixture was a conversion and gave an action analogous to trover. But the common law, with more policy and justice, to guard against fraud, gave the entire property, without any account, to him whose property was originally invaded and its distinct character destroyed. If *A.* wilfully intermix his corn or hay with that of *B.*, so that it becomes impossible to distinguish what belonged to *A.* from what belonged to *B.*, the whole belongs to *B.*: 2 *Kent's* Com. 365, referring to *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62.

One of the earliest common law cases to be found is *Ward* v. *Ayre*, Cro. Jac. 366. It was trespass for assault and battery. The case, in the quaint language of the old report, was this: "The plaintiff and the defendant being at play, the plaintiff thrust his money into the defendant's heap and mixed it, and the defendant kept it all; whereupon (they striving for the money) the plaintiff brought this action. And the whole Court were of opinion in regard the plaintiff's own money cannot be known, and this his intermeddling is his own act, and his own wrong, that by the law he shall lose all; for, if it were otherwise, a man might then be made a trespasser against his will, by the taking of his own goods; therefore, to avoid that inconvenience, the law will justify the defendant's detaining of all; and so it is of an heap of corn voluntarily intermingled with another man's. Whereupon the the rule of the Court was—'*Quod querens nihil capiat per billam.*'"

It has long been held in Courts of equity, on the same principle, that an agent confounding his principal's property with his own is to be charged with all except what he can prove to be his own: *Lupton* v. *White*, 15 Ves. 432. So far as the agent is incapable of distinguishing his own from his principal's property, the property is treated as the property of the principal: *Chedworth* v. *Edwards*, 8 Ves. 46; *Colburn* v. *Simms*, 2 Hare, 543, 554. Courts of equity, in thus holding, proceed on the ground that it would be ine-

quitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal: *Story's* Eq. Jur., sec. 465; *Taylor's* Eq. Jur., sec. 331.

In our own law, so far as the authorities go, they are in favour of the view that when goods of different owners become, *by accident,* so mixed together *as to be undistinguishable,* the owners of the goods so mixed become tenants in common of the whole in the proportions which they have severally contributed to it: Per Bovill C. J., in *Spence* v. *Union Marine Ins. Co.,* L. R. 3 C. P. 437. See further, *Jones* v. *Moore,* 4 Y. & C. 351; *Buckley* v. *Gross,* 3 B. & S 566, 574; *Moffatt* v. *Grand Trunk R. W. Co.,* 15 C. P. 392; *Mason* v. *The Great Western R. W. Co.,* 31 U. C. R. 73, 88; *Coffey* v. *The Quebec Bank,* 20 C. P. 107, 110, 555.

It has been long settled in our law that where goods are mixed so as to become undistinguishable by the *wrongful act or default* of one owner, he cannot recover and will not be entitled to his proportion or any part of the property from the owner, but no authority has been cited to shew that any such principle has ever been applied, nor indeed could it be applied, to the case of an *accidental mixing* of the goods of two owners; and there is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners and become *bona vacantia.* The goods being before they are mixed the separate property of the several owners, unless, which is absurd they cease to be property by accidental mixture when they would not so cease if the mixture were designed, must continue to be the property of the original owners; and as there would be no means of distinguishing the property of each, the several owners seem necessarily to become jointly interested as tenants in common in the bulk. This is the rule of the Roman Law as stated in *Mackeldey's* Modern Civil Law under the title *commixtio et confusio* in the special part Book 1, sec. 270. The passages in

Mr. Justice *Story's* book on Bailments sec. 40, and in the 9th volume of *Pothier* "De la Confusion" as well as the French and various other codes, are to the same effect: per Bovill, C. J., in *Spence* v. *Union Marine Ins. Co.*, L. R. 3 C. P. 437. 438.

Bovill, C. J., applying these principles to the case before him—confusion of cotton belonging to the different owners owing to the shipwreck of the vessel which was carrying it—in the able judgment, from which I have already quoted so largely, said, p. 438, "We are thus, by authorities in our own law, by the reason of the thing, and by the concurrence of foreign writers, justified in adopting the conclusion that, by our own law, the property in the cotton, of which the marks were obliterated did not cease to belong to the respective owners, and that by the mixture of the bales, and their becoming undistinguishable by reason of the action of the sea, and without fault of the respective owners, these parties became tenants in common of the cotton, in proportion to their respective interests. This result would follow only in those cases where, *after the adoption of all reasonable means and exertions* to identify or separate the goods, it was found *impracticable* to do so."

This exposition of the law as applied to the particular case is in effect the same as stated in *Waterman* on Trespass. secs. 405, 406, 407, 408; 2 *Parsons* on Contracts, 5th ed., 136, 198, and is fully sustained by the following United States decisions: *Loomis* v. *Green*, 7 Maine 386; *Hesseltine* v. *Stockwell*, 30 Maine 237; *Bryant* v. *Ware*, *Ib.* 295; *Dillingham* v. *Smith*, *Ib.* 370; *Foster* v. *Cushing*, 35 Maine 60; *Hart* v. *Ten Eyck*, 2 Johns C. 62; *Wilson* v. *Nason*, 4 Bosw. (N. Y.) 155; *Seavy* v. *Dearborn*, 19 N. H. 351; *Stephens* v. *Little*, 10 Mich. 433; *Beach* v. *Schmultz*, 20 Ill. 185; *Willard* v. *Rice*, 11 Metc. 493; *Robinson* v. *Holt*, 39 N. H. 557; *Wilson* v. *Wentworth*, 25 N. H. 245; *Hyde* v. *Cookson*, 21 Barb. 92; *Jenkins* v. *Steanka*, 19 Wis. 126; *Root* v. *Bonnema*, 22 Wis. 539; *Pratt* v. *Bryant*, 20 Verm. 333.

Story, in sec. 40 of the well known work on Bailments, 8th ed., says, after referring to some of the foregoing cases: "The conclusion to be drawn from these decisions, and other

authorities, seems to be, that, in cases of negligent and inadvertent mixtures (perhaps even of wilful mixtures), *if the goods can be easily distinguished and separated,* then no change of property takes place, and each party may lay claim to his own."

The question for our decision is, whether an intentional mixture, but in good faith, where the goods can be by the person who mixed them *distinguished and separated,* is to be treated as governed by the same principles as an *accidental* mixture.

All the cases, both English and American, to which I have referred, in which it has been held that the person mixing the goods lost his property in the goods, are cases where the owner acted fraudulently or in bad faith, and acted so effectually as to prevent a separation of the goods which he had mixed. Both these elements are wanting here. There was no fraud, and notwithstanding the mixture the goods could be separated, and would, according to the testimony for the plaintiff, have been separated had not defendants' agent said he did not care where they came from, he would take them, and did take the property just as he threatened to do.

The nearest case on the facts to the present which I have seen is, *Ryder* v. *Hathaway,* 21 Pick. 298, a decision of the Supreme Court of Massachusetts. It was, according to the report, "trespass for taking, carrying, and converting twenty-three cords of wood." The defendant justified the taking on the ground that the wood was cut upon his land without right and was his property, or "that if any wood was taken by him belonging to the plaintiff, it was because by the plaintiff's own wrong it had been so mixed with the defendant's wood that it could not be distinguished." The trial took place before Shaw, C. J. It appeared that the wood was cut by the plaintiff on a tract of land of which a part belonged to the defendant. The Chief Justice instructed the jury that if the plaintiff took the wood without right from land to which the defendant had title the defendant had a right to take it away; that if the bulk of the wood was taken from the defendant's

land, but a part of the plaintiff's own wood was so mixed with the defendants in the same pile, either that the defendant did not know it or could not by any reasonable examination distinguish it, the taking of such a part was not a trespass; *a fortiori* if it was done so wilfully and fraudulently in order to expose the defendant to the danger of taking some of the plaintiff's wood in case he should take his own; but that it would be otherwise if the defendant knew that a part was the plaintiff's wood and could by reasonable care distinguish and separate it. On this charge the jury found for defendant. There was a motion against that verdict on the grounds of misdirection, law, evidence, and the weight of evidence, and the verdict was set aside.

In delivering the unanimous opinion of the Court, then and still distinguished among the supreme Courts of the United States for its ability and learning, Morton, J., after dealing with the cases of mere accidental mixture, said, at p. 304, "The cases of *intentional* mixture, present questions of greater perplexity * * There may be an intentional intermingling, and yet no wrong intended, as where a man mixes two parcels together, supposing both to be his own, or that he was about to mingle his with his neighbour's by agreement, and mistakes the parcel. In such cases, which may be deemed accidental mixtures, it would be unreasonable and unjust that he should lose his own, or be obliged to take his neighbour's. If they were of equal value, as corn, or wood, of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But if they were of unequal value the rule would be more difficult. And if the intermixture was such as to destroy the property, the whole loss should fall on him whose carelessness or folly or misfortune caused the destruction of the whole * * The intentional and innocent intermixture of property of substantially the same quality and value does not change the ownership. And no one has a right to take the whole, but in so doing commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as be-

longed to him. It must already have been perceived, that these principles are not perfectly consistent with the unqualified rule laid down for the government of the jury. According to the above doctrine, if the plaintiff actually supposed, that the land from which the wood was taken was his own, and that all the wood was his, then the mingling it together should not divest him of that which honestly belonged to him. But if he knew that the land was not his, or if he doubted whether it was his or not, and mixed the wood with an intent to mislead or deceive the defendant, and to prevent him from taking his own without danger of taking the plaintiff's, then he has by his own fraudulent act lost his property and can have no remedy. But if, as above stated, the plaintiff mingled the wood from different lots, supposing all to be his own, and if the defendant, knowing that some part of the wood came from the plaintiff's land, took the whole, he was a a trespasser, and is responsible in this action for the value of the plaintiff's wood thus taken by him, * * * The verdict must therefore be set aside, and a new trial granted."

I have quoted at length from this decision, not only because it is singularly applicable on the facts to the case now before us, but because it contains principles so consistent with reason and justice, and with the decisions of the English law to which I have referred, that I cannot do better than accept it as containing a correct exposition of the law to be applied in this case.

It was decided as long since as 1838, and the doctrines which it enumerates have been approved and followed in several other more recent cases in different States of the Union: See *Pratt* v. *Bryant*, 20 Verm. 333; *Rose* v. *Gallup*, 33 Conn. 338; *Silsbury* v. *Macoin*, 3 Conn., 378; *Moore* v. *Erie R. W. Co.*, 7 Lansing 39.

The plaintiff here cut the timber on lot 25, believing that he had a right to do so. He thought, at the time, that he had as much right to cut timber on lot 25 as on lot 24. He for this reason, and for no other reason, placed all the timber together, but it so happened that he was able notwithstanding to distinguish and separate the timber. He

told defendants' agent of his ability to do so, and warned the agent not to take what did not belong to him. This warning the defendants' agent recklessly disregarded. He said he did not care where it came from, that he would draw it. And he did as he threatened, and in doing as he threatened he, I think, made the defendants liable in this action to trespass.

The timber cut on lot 24 belonged to the plaintiff. It did not cease to be his at any time. It was, therefore, plaintiffs when defendants' agent took it. So that the verdict for the timber cut on lot 24 must stand, and the defendants' rule be also discharged.

MORRISON, J., and WILSON, J., concurred.

Both rules discharged.

From this judgment, the defendants appealed, on the grounds:—

1. That the Court was in the same position as the Judge who tried the same; and that on the record and evidence, the defendants were entitled to a verdict on the plea of set-off to the last count of the declaration for an amount equal to that awarded to the plaintiff; and thus the judgment should have been at least on that issue for defendants.

2. That the rule *nisi* should have been made absolute on the grounds stated therein, as the second and subsequent grounds of the motion.

3. That the plaintiff had no right to maintain his action, as regards the first, second, third, and fourth counts of his declaration, or any of them, and that the offset was an answer to the last count and was proved.

4. That defendants were justified in taking the fifty-one pieces of timber, for which the verdict was given against them; and that neither trespass nor case would lie against them for doing so on the facts shewn in the evidence.

5. That the judgment on the evidence, and on the defendants' rule, should have been for the defendants.

The plaintiff's reasons against the appeal were:—

1. The defendants were not entitled to a verdict upon the

plea of set-off as the work and labour done by the plaintiff upon the timber claimed by the defendants rendered that timber more valuable to the defendants which work and labour the defendants received the benefit of, and the amount of which would more than equal the amount of timber, if any, belonging to defendants and taken by plaintiff.

2. The defendants were not entitled to a verdict upon the plea of set-off, as the learned Judge, on the trial of this cause, ordered that the common counts and plea of set-off be struck out.

3. The trial did not proceed upon the common counts or plea of set-off, but only upon the first, second, and third counts, and pleas applicable thereto, and the plea of set-off is not applicable to these counts.

4. The rule *nisi* should not have been made absolute, as the evidence shewed that the plaintiff was entitled to recover herein, and the verdict for the plaintiff is not contrary to law.

5. The plaintiff was entitled to recover upon the first, second, and third counts, and the verdict was for the defendants upon the fourth connt. The damages were assessed upon the first, second, and third counts. No plea in reference to these counts was proved.

6. The defendants were not justified in taking the 51 pieces of timber, for which the verdict was given against them. These 51 pieces were the property of plaintiff. They were so marked as to be known as the property of plaintiff. No demand was made by defendants for timber belonging to defendants; but they with force, and contrary to law, committed the trespasses complained of. The mixing of timber was not at the time it was done known by plaintiff to be wrongful, and no request was made by the defendants to the plaintiff to point out timber which was cut upon the land in the fourth count mentioned; but the defendants at their own peril and without legal process, entered upon the plaintiff's possession and took the plaintiff's property for which the damages have been assessed herein.

7. That the judgment for the plaintiff on the evidence and on the defendants' rule is right, and should not be reversed.

The appeal was argued June 22, by *Bethune*, Q.C., for the appellants, and *T. D. Delamere* for the respondent.

The argument was similar to that in the court below. (*a*)

September 15, 1876. DRAPER, C. J.—The action is brought by plaintiff to recover the value of certain pieces of timber taken by defendants.

Plaintiff swears that he cut 480 pieces of white pine timber upon lots 24 and 25, 11th concession of Hinchinbrooke, and drew them upon the ice on Long Lake in the township of Olden, a distance of about three miles, and that the defendants took possession of 185 of these pieces. He stated that he got this lumber out for himself, and that he marked it with the letter R as he made it. He further said that the R marked on timber cut upon No. 24 differed from that marked on timber cut on No. 25; but he does not appear to have been asked to point out the difference, nor yet to state what number of pieces he drew from No. 25.

I think it may be fairly assumed, and it is the most favorable view for the plaintiff, that he cut the timber on No. 25 in a belief that a deed put in, dated 13th January, 1875, gave him the right. I do not mean to say that this may not be open to doubt; still, on the case as made, the assumption is not unreasonable. But such was not the fact, for defendants proved a prior title to this lot. The plaintiff was, therefore, a wrong-doer in taking the timber from that lot.

By drawing that timber away, the plaintiff (it may be ignorantly) took defendants' property, and by mixing it with the timber cut upon No. 24 the plaintiff rendered it impossible for the defendants to identify their own. He swears, however, that he could do so, but even when aware that defendants were taking away part of the timber cut upon No. 24, he withheld the information.

But the question is not simply, whether the defendants

(*a*) Present.—DRAPER, C. J. of Appeal; BURTON, J.; PATTERSON, J.; MOSS, J.

owned the 51 pieces of timber which they took away from Long Lake, for on that point the plaintiff's evidence is clear against them, and with the exception of the 45 pieces which Scanlan marked as theirs, they had no means of identifying the pieces on Long Lake which had been taken off No. 25 ; the real question appears to me to be, whether under all the circumstances the act of the defendants was wrongful as against the plaintiff.

The mixing and confusion of the timber was the plaintiff's doing. First of all he was a wrong-doer in cutting and taking the timber from No. 25 ; then by mixing that timber with his own on Long Lake he created that confusion of property which rendered it impossible for the defendants to identify their own. If, then, the defendants took no more in quantity and value than was, in the mixed heap, their rightful proportion, I fail to see what wrong they have done to the plaintiff. As to value, the plaintiff himself stated that he got a better quality of timber from No. 25 than from No. 24, and other witnesses say that there was not much difference between the timber on the two lots.

The question whether there was in fact such an intermixture and confusion of the timber that the defendants could not tell their own, does not appear to have been raised at the trial, nor to have been formally adjudicated by the learned Judge who tried the case without a jury.

His finding of the facts was not moved against, but he reserved leave to the defendants to move to enter a verdict in their favour if the Court, upon all the evidence, should think the Judge should have found for them. The Court of Queen's Bench discharged a rule *nisi* granted to the defendants upon leave reserved. The appeal is against that decision.

Upon the evidence thus submitted to the Queen's Bench, and by the appeal brought under our consideration, I have arrived at the following results :—

I think the plaintiff cut and drew off the timber from both lots in good faith, supposing himself to be the owner of both.

I think that the defendants were the owners of lot 25 at the time the plaintiff cut and drew off the timber.

I am not altogether satisfied that the plaintiff had a distinguishing mark between the timber severally cut upon these two lots. While he supposed himself to be owner of both, no motive for the distinction is suggested or is apparent ; and on finding out his mistake, it seems more like an effort to prevent the assertion of the defendants' claim than a *bonâ fide* notice of an actual right in the plaintiff. If he was only stating the truth, desiring no more than to preserve his own property, it is difficult to understand why he did not point out the different marks, while it is possible he may have thought that in the uncertainty the defendants might leave to him some of their timber. However this may be, I think he cannot take advantage of his withholding the information so as to enable him to insist that the confusion did not exist upon which the defendants could justify taking out of the mixed quantity a portion, not identified as their own, but in quantity and quality not more than equal to their own.

When Scanlon was taking a part of the timber which had been cut on No. 24 he had no means of distinguishing it from that cut on No. 25. The plaintiff on the contrary could, as he asserts, distinguish the sticks cut on No. 24, but did not inform Scanlon what was the mark of distinction. Why ? The reason he gives is, that Scanlon did not ask him, though plaintiff told him he could do so, but that Scanlon replied "he did not care where it came from he would take it."

In my opinion the plaintiff should have gone further, and if there was a distinguishing mark he should have pointed it out, and then if Scanlon persisted in taking what he had notice had been cut on No. 24, he would have been wrong. The plaintiff's withholding what he represents he knew appears to me to be open to two constructions : one, that he had no such distinguishing mark ; the other, that he thought the defendants would be liable if (even ignorantly) they took any timber which was cut on No. 24. On either supposition the plaintiff should not recover.

I agree in the law as stated in the charge to the jury in *Ryder* v. *Hathaway*, 21 Pick. 298, where it is stated that "if the plaintiff took the wood without right from land to which the defendant had title the defendant had a right to take it away; that if the bulk of the wood was taken from defendant's land, but a part of the plaintiff's own wood was so mixed with the defendant's wood in the same pile, either that the defendant did not know it or could not by any reasonable examination distinguish it, the taking of such part was not a trespass; *a fortiori*, if it was done so wilfully or fraudulently in order to expose the defendant to the danger of taking some of the plaintiff's wood in case he should take his own; but that it would be otherwise if the defendant knew that a part was the plaintiff's wood, and could by reasonable care distinguish and separate it."

The portion I have quoted down to "*a fortiori*," &c., I adopt and follow; the latter portion I have set out only that the whole might be seen, though the plaintiff's conduct might, taking the most unfavorable view of it, relieve the defendants from responsibility. Looking at this case throughout, it appears to me that the defendants got no more than was taken off No. 25, that the plaintiff got as much as was taken off No. 24, and that the plaintiff in mixing together the timber from both lots, and withholding the information he possessed as to identity, reduced the defendants to the necessity of taking as well as they could from the mixed heap, a quantity not exceeding that which the plaintiff had removed from No. 25; and more than this it is not proved that they have taken.

I think, therefore, the appeal should be allowed with costs, and that the rule to enter a verdict for the defendants should be made absolute.

BURTON, J.—The plaintiff innocently, we may assume, cut timber upon the defendants' lot, which he mixed with other timber of a like nature cut upon his own property. If none of this timber had been marked, but became in this way intermingled and undistinguishable, it appears

clear, upon the authorities, that the plaintiff and defendants would have become tenants in common of the timber, each being entitled, in the joint property, to the number of sticks of which he was the owner previous to the confusion.

Can the plaintiff, who was the cause of the wrong, innocently or otherwise, deprive the defendants of their right to treat him as a trespasser, because he has in his own breast the means of identifying and distinguishing the property, but which he neglects or refuses to disclose when a claim is made? It would seem to be more consistent with common sense, and I think it will be found to be in accordance with law, that the person who has created the confusion should, when a claim is made, point out his own property and give every reasonable information to the other, so that he may take that only to which he is rightfully entitled.

I think the learned Chief Justice of the Queen's Bench has correctly described what the plaintiff's agent did here: "He told the defendants' agent," he says, "of his ability to do so," *i.e.*, to distinguish and separate the timber, and warned him not to take what did not belong to him. This warning, he adds, the defendants recklessly disregarded.

But what the plaintiff did fell far short of what equity and fair dealing called upon him to do. He was the cause of the wrong. The defendants were merely claiming their own property. What was an innocent act previously became wilful when the plaintiff neglected to do, what he satisfied himself with saying he had the ability to do, viz., to point out to the defendants what belonged to them and what to him. The neglect to take active steps to point out the property as effectually prevented the defendants from taking their own property as if no means existed of distinguishing it, and reduced them to the necessity of taking an equivalent portion from the common stock.

Before the plaintiff could treat the defendants as trespassers it was incumbent upon him to shew, not that he had the means of identifying and distinguishing the pro-

perty, but that he offered to do so. The onus was upon him and he has failed to shew any such offer. It is clear that the defendants were entitled to 51 sticks which the plaintiff had cut and removed from the property, so that the decision we are enabled to arrive at meets the justice of the case.

I am of opinion that the judgment should be reversed, and the rule made absolute to set aside the verdict and enter it for the defendants.

PATTERSON, J.—The declaration contains five counts:

1. Trespass *de bonis asportatis.*
2. Detinue for timber.
3 & 4. Trespass *quare clausum fregit.*
5. Money count.

The third and fourth counts are not now in question.

The pleas to the first and second counts, except as to three sticks of timber mentioned in each of those counts, are not guilty and not possessed.

To the fifth count, the defendants plead never indebted, payment, and set-off.

Issue is joined on all these pleas.

As to the timber excepted from the pleas to the first and second counts, the defendants plead payment into Court of $20, and the plaintiff replies that that sum is not enough to satisfy the plaintiff's claim in respect of the matters pleaded to.

The issues were tried before Galt, J., without a jury, and a verdict entered for the plaintiff for $250 damages.

The plaintiff, who is a lumberman, had cut timber on lots 24 and 25 in the 11th concession of the township of Hinchinbrooke. Lot 24 belonged to the plaintiff, and he had obtained a conveyance of lot 25 and supposed himself to be the owner of that lot; but it appeared, after the timber was cut, and after all but about 45 pieces had been drawn off lot 25, that the defendants were really the owners of that lot under a conveyance which was earlier than the plaintiff's, and which had been duly registered in the proper office,

but by reason of its not having been properly indexed, had not been brought to the plaintiff's notice. When the defendants discovered that the plaintiff was cutting timber on their lot, they gave notice to the plaintiff or his foreman that the lot was theirs, and marked with their mark 45 pieces of timber which still remained on the lot.

The plaintiff, however, continued to draw the timber from the lot, and placed all he drew, whether from lot 24 or lot 25, in the same place. All the timber was marked with the letter R, which was the plaintiff's mark, or the mark of a Mr. Ross, of Quebec, who was supplying him with money to get out the timber. There was nothing in the character or size of the timber, or in any mark upon it, to enable the defendants to know from which lot any particular piece had been taken, except the marks which the defendants had put on the 45 pieces; but the plaintiff says that the R on the timber from lot 24 was of a different shape from the R on that from lot 25, and would have enabled *him* to distinguish the timber taken from each lot; although he does not say, so far as noted in the evidence before us, how it happened that the use of the peculiarly shaped R should have been confined to one portion of the limits, when, as the evidence shews, he was cutting over these two contiguous lots 24 and 25, and over a lot in Kennebec, which was divided from lot 25 only by an allowance for road, and over the allowance for road itself, and supposed he had an equal right to every portion of those limits, and when there was no distinction in the quality or the destination of the timber.

Evidence was given of the number of trees cut on the defendants' lot, and the learned Judge found as a fact that the plaintiff had cut and drawn from the defendants' lot as many pieces of timber as the defendants afterwards drew away.

The plaintiff having, as above stated, drawn away all the timber to Long Lake where it was to be floated, the defendants drew away from there a number of pieces, said to be 185, including in that number the 45 which they had

marked, but taking the rest as they found them lying, without knowing or attempting to distinguish from which lot 24, or 25, any particular stick was cut, and in so doing they drew away, as the learned Judge has found, 51 pieces which grew on lot 24, and not on lot 25.

The action is for the taking of all the timber, not merely for the 51 pieces. The plaintiff claimed title to it all on the ground that by reason of the irregularity in connection with the registration of the defendants' deed, that deed had been postponed to the plaintiff's deed; but the decision of this question being against the plaintiff, he has a verdict in respect of the 51 pieces only.

The position may be stated in this way. The plaintiff has taken and retained 51 pieces of the defendants' timber, and the defendants have taken and retained 51 pieces of plaintiff's timber. The timber off one of the lots is of the same average quality, size, and value as that off the other lot, therefore neither party has suffered any pecuniary loss by the exchange.

The question is, can the plaintiff maintain his present verdict—leaving the defendants to seek their remedy by action or otherwise, for the timber which they failed to retake; must they now pay the plaintiff $250, and then proceed against the plaintiff to recover $250 from him. To have to put or consider such a question may seem to indicate that our law is not yet perfect in its provision for the adjustment of the rights of parties; but it may be that the anomaly is more apparent than real, and that the law as it stands is sufficient to render such purposeless circuity of action unnecessary.

The verdict is entered generally; but it is evident that if it can be sustained it must be on the first count. It is not applicable to the second, or detinue count, being for damages only, and not finding the value of the goods; and it cannot apply to the money count, because this action was brought only two or there days after the taking of the timber and before it had been sold, and therefore the circumstances had not arisen under which each party might

have waived the tort committed by the other, and framed his claim for money had and received.

The rule *nisi* was to enter a nonsuit or verdict for defendants pursuant to leave reserved and pursuant to the Administration of Justice Act, 1873, by which the Law Reform Amendment Act of 1869, is probably intended.

The appeal is from the judgment of the Court of Queen's Bench discharging that rule.

The law on the subject of the confusion of property by commixture, although it was spoken of as unfamiliar and obscure by Morton J. in the judgment delivered by him in 1838, in *Ryder* v. *Hathaway*, 21 Pick. 298, in the Supreme Judicial Court of Massachusetts, as quoted by the learned Chief Justice in the the Court below, has by means of that and many other decisions come to be well understood.

It is very well stated in Mr. *Waterman's* late work on Trespass in vol. i. sections 405, 406, and 407, and his statement is supported by the authorities, English and American, which he cites.

I quote from these sections :—

Sec. 405: "In Michigan, where a person wrongfully mingled his own saw logs with those of another, it was held that the latter might seize all of the logs if he could do so without violence, and that he was not liable for the accidental destruction of the property while thus in his possession. In Maine, where a person found his timber, which had been wrongfully taken from his land, mingled with other timber so that it could not be distinguished, it was held that he could lawfully take possession of the whole, even if afterwards obliged to account to the true owner for a portion of it."

Sec. 406: "If the intermingling of goods be wilful, and without the consent of the other, and the articles are of such a nature that they cannot be distinguished and separated, the civil law gives the whole to the one not consenting to the mixture, but allows a satisfaction to the other. But the common law gives the whole to the one not consenting, without compensation to the other. This

however, is to be carried no further than necessity requires; and it seems to be understood that if the articles so mingled are of the same kind and of equal value, the injured party may take his given quantity, and not the whole."

Sec. 407 : "When the confusion or commixture of goods is made with the consent of the owners, or by accident, or by the inadvertence or negligence of one of the owners, and the goods are of such a nature that they can be identified and separated, as if A. mixes some of B.'s cattle, sheep, horses, wood, or furniture with his own, erroneously supposing that they belong to him, the property of each remains as before ; and when, although the identity remains, they cannot be distinguished, each owner is entitled to his share. When the wood of two persons became intermingled and indistinguishable, without the fault of either, it was held that they became tenants in common of the wood, each being entitled in the joint property to the number of cords of which he was the owner previous to the confusion of the wood."

This statement of the law does not differ from that enunciated by the learned Chief Justice. If it had appeared to the Court of Queen's Bench that there had been in fact such a mixture as to disable the defendants from distinguishing the timber which grew on their lot from the rest of the timber, it would have been held, as I understand from the judgment delivered, that the defendants had a right to do what they did, viz., to take from the common stock their proper share, leaving all the rest for the plaintiff, without regard to the original ownership of this piece or that.

It is held, however, that there was no such confusion of the property: that the plaintiff had the means of distinguishing his own timber from that of the defendants; and that he would have pointed out his timber had not the defendants' agent, Scanlon, expressed his determination to disregard the original ownership, and to take the number of pieces to which the defendants were entitled, whether they grew on lot 24 or lot 25 : that in effect the defendants,

with the knowledge that the means existed within their reach to distinguish their own timber from the plaintiff's, chose to shut their eyes to the distinction, and wilfully continued to draw indiscriminately until they had taken their quantity.

The question is therefore one of fact, rather than of law. Was there confusion, or was there not? If there was, we should apply the law just as the Court of Queen's Bench would have applied it, in holding that the defendants were right. If there was not, we should agree with the Queen's Bench in holding that the original ownership of each piece remained, and that the defendants are trespassers in respect of the 51 pieces of timber.

This question of fact does not seem to have been presented for the decision of the learned Judge who tried the issues.

It cannot be supposed to have been the intention of the Legislature in giving power to the Court by 33 Vic., ch. 7, sec. 6, to pronounce the verdict which, in their judgment, the Judge who tried the cause ought to have pronounced in cases where a verdict is objected to on the ground of insufficiency of the evidence or the erroneous view taken of it by the Judge, that the Court should decide, upon the evidence, questions not debated before or decided by the Judge. The question under the statute is, whether the view taken by the Judge was correct or erroneous. The Judge in this case does not appear to have been asked to form any view of the evidence on this question.

This consideration is by no means technical or unimportant; because if the point had been made at the trial further evidence might have been given, or the Judge might have discredited the story told by the plaintiff, which it strikes me he might very well have done, or have drawn from his evidence an inference different from that which, on merely reading the notes of evidence, might seem to be proper.

In my judgment the Court should hesitate to take any

fact as proved, unless it has been found by the Judge at the trial, or the evidence is so clear and unambiguous as to shew that it must have been conceded at the trial, or unless the fact is found by the Court itself contrary to the finding of the Judge, and upon a review of evidence upon which the Judge formed an opinion. As this matter comes before us, we have to review, not the finding of the Judge at the trial, but the finding of the Court of Queen's Bench. I do not think a finding under these circumstances should be supported unless the evidence clearly and directly, and so as to exclude any doubt, leads to the conclusion arrived at. If the evidence is not of this character, but requires us to deduce or infer the fact in question from testimony which involves argument and is open to different constructions, I should refuse to draw the inference, and as against the party who ought to have established his proposition at the trial, but who failed to present it there for the decision of the Judge, I should treat it as not proved.

I do not take the view of the evidence in this case which was taken in the Court below. I do not think it points distinctly to the conclusions on which the judgment rests, and, dealing with it as a juror, I should arrive at a different conclusion.

It may not be very material to inquire whether or not the plaintiff was entirely innocent in taking the timber off lot 25 and mixing it with the other timber. Before deciding that in his favour, we should have to consider well the effect to be given to his persisting in drawing the timber from that lot, even after it was marked and claimed by the defendants, and after he had express notice of their title, and his forbidding the defendants to take any timber, and his contesting the defendants' claim to the lot itself and to all the timber until the Court decided that question against him; and we should have to look for something to explain why he marked the lot 25 timber differently from the rest, *if the fact is* that he did mark it by a different mark.

I am not satisfied from the plaintiff's evidence that he

could have distinguished the lot 25 timber by the shape of the R.; still less am I disposed to adopt the conclusion that he would have pointed out the lot 24 timber only for what Scanlon said.

The evidence on this subject is that of the plaintiff and of Jesse Shibley.

The *plaintiff's* evidence on this point was this: Defendants sent a number of men and teams and drew away 185 pieces. * * I forbade defendants' agent from touching the timber. He said he would take it.

Cross-examined— * * Scanlon told me on the 10th of March last that they claimed the timber cut on this lot. I did not point out what was cut on 25 and what was on 24. All the timber cut on both lots was lying together.

Re-examined—There were 51 pieces cut on lot 24, drawn away by defendants.

Re-cross-examination—I did not tell Mr. Scanlon how to identify the sticks cut on lot 24. I knew them myself from the shape of the R being different on them from those cut on 25. I was there the most of the time when defendants were drawing the timber. I saw the timber they were taking. I saw defendants' mark on some 40 pieces on the ice. They took all this.

Re-examined—Scanlon did not ask me to point out the timber cut on lot 24. I told him I could do so. He said he did not care where it came from, that he would draw it.

Jesse Shibley—I went with plaintiff on 10th of March to Long Lake. Mr. Scanlon was there with a lot of teams taking away some timber. Mr. Lawrie forbade him. He said he would take it away. Mr. Scanlon said that Mr. Rathburn had a title to lot 25. Plaintiff said he did not think so, and that they were taking the timber that came off lot 24. Scanlon said he did not care what lot it came off, he would take it.

Cross-examined—Plaintiff did not offer to point out the timber cut on lot 24.

This evidence seems to me to shew that Scanlon, knowing how many pieces of timber the defendants' were entitled

to, was determined to take that number, taking the lot 25 timber so far as he knew it; and that if the plaintiff told him he was taking lot 24 timber, he neither offered nor gave Scanlon to understand that he was offering to point it out to him. The plaintiff was forbidding him taking any timber whatever. Shibley says that plaintiff told Scanlon that he was taking timber which came off lot 24. This may have been told him, as I should infer it was, either as a mere random statement, or at all events without being specially pointed towards the 51 pieces. If either the plaintiff or Shibley could have shewn that he had pointed out to Scanlon any one stick of timber which he was taking, and had said to him, "That stick came off lot 24; look at the R; that shaped R is only on the lot 24 sticks, and you must not take any with that mark," there would have been more ground for assuming, in the plaintiff's favor, that the good faith was all on his side.

From the evidence given by the plaintiff and Shibley, that the plaintiff was there most of the time while the drawing was going on, and saw the timber that was drawn, and told Scanlon that he was drawing lot 24 timber, forbidding him taking any timber, while telling him that plaintiff himself could distinguish the one lot from the other; and yet never offering to point out to him the lot 24 timber, nor even telling him what the distinctive mark was or pointing it out to him on the sticks they were looking at and handling, I receive no impression whatever on my own mind to the effect that the plaintiff would have pointed out his timber but for Scanlon's threat to take straight before him. I rather infer that if anything was said to Scanlon like what the plaintiff or Shibley swears to, it must have appeared to Scanlon, even if not expressly so intended by the plaintiff, as mere vaporing to prevent him from taking any timber, and was naturally answered by Scanlon by saying he was determined to take his quantity notwithstanding what they said, and that as he could not distinguish the different lots (as it is clear they all knew he could not) he would take it as it came.

It is entirely opposed to my ideas of what people do in such circumstances, to imagine that if the plaintiff had a distinctive mark on the timber, he would stand by and see Scanlon draw it, and tell him he was drawing it, without speaking of the mark or pointing it out, and this confirms my incredulity as to there being any distinctive mark.

But take either view of the evidence, either that the plaintiff's silence indicates that there was no such distinctive mark—and that the existence of it is an afterthought —or that it was there, and that the plaintiff was purposely reticent about it when he spoke to Scanlon—the effect upon the result of the evidence is much the same.

In my view the proper conclusion from the whole evidence is, that the timber from the different lots was mixed by the plaintiff so as not to be distinguishable, and that the plaintiff so drew out and mixed the timber without any fraudulent design; and while I do not think we should hold that he did so without believing that the timber was his, or that he had not fair and reasonable ground for supposing that he could maintain his title to it, I do not think we could hold affirmatively in his favour, even if it were important to do so, anything which would go the length of deciding that the mixture was accidental or unintentional.

I am of opinion that there was such a confusion as entitled the defendants to take their quantity from the timber as they found it, and this was all they did; out of the common stock they simply took their share, and left the rest for the plaintiff, who retained it without regard to where it came from.

My view of the case may be shortly repeated in another form.

The defendants came to take their timber, and found some 400 pieces with nothing to indicate which of them originally had been theirs, excepting always the 45 pieces.

If nothing more were shewn there could be no question of their right to take their proportionate share. This was the position when they began to draw.

The onus is on the plaintiff to shew that this apparent position was not the real one, because means existed by

which the defendants might have distinguished one piece of timber from another. I think the plaintiff has failed to shew this, and that the appeal should be allowed, with costs, and the rule be made absolute to enter a verdict for the defendants.

Moss, J.—The learned Chief Justice, in delivering the judgment of the Court of Queen's Bench, expressly accepts the principles enunciated by the Supreme Court of Massachusetts in *Ryder* v. *Hathaway*, 21 Pick. 298, as containing the law applicable to this case. I agree with the learned Chief Justice in thinking that these principles are consistent with reason and justice, and that they are supported by English decisions. They do not seem to differ in any material respect from the views expressed in *Spence* v. *Union Marine Insurance Co.*, L. R. 3 C. P. 427, 439. But with great deference I am of opinion that the correct application of these rules leads to a result contrary to that arrived at by the Court below.

The special rule which, in my judgment, governs this case, is, that which declares that the unintentional and innocent admixture of property of substantially the same quality does not change the ownership; and that no one owner has a right to take the whole, and in so doing he commits a trespass on the other owner. His duty is thus defined: "He should notify him (the other owner), to make a division or to take his own proportion at his peril, taking care to leave to the other as much as belonged to him." In another passage it is said with reference to an intentional mixture without any intentional wrong, as where a man mixes two parcels together, supposing both to be his own, that if they were of equal value, as corn or wood of the same kind, the rule of justice would be obvious:—"Let each one take his own quantity." That duty, I think, the present appellants fulfilled, and that rule of justice they are entitled to invoke. They took their own proportion, and they left to the respondent the quantity which belonged to him; or, to speak with

entire accuracy, they happened to take three pieces more than their own proportion, and for these they have rendered satisfaction to the respondent, by paying their value into Court.

It is established by the evidence that the pieces of timber taken from the different lots were of similar quality and about equal in value. If there was any difference, it seems that those taken from the appellants' lot were rather the better.

But it is argued that this rule does not apply because the pieces taken from the respective lots were distinguishable. The authorities do seem to shew that if the articles can readily and with reasonable exertion be separated, each party may lay claim to his own. In point of fact under such circumstances no real confusion exists. Articles belonging to different owners are placed in juxtaposition, or scattered amongst each other, but there is no serious difficulty—much less impossibility—in separating each owner's portion from the mass. In cases falling within this branch of the rule it is obviously assumed that before the altered situation each portion bore distinctive and recognizable marks.

But I am of opinion that the proper conclusion from the evidence in this case is, that there was confusion of the timber, in the legal sense of that term. The only particle of evidence upon which it could be determined that the pieces were distinguishable, or could be separated by any person, is the respondent's own statement, made upon his second cross-examination, that he knew the pieces cut on lot 24 (his own property), from the shape of the R upon them being different from those cut on lot 25, which was the appellants'; and his further statement, made upon his being examined by his own counsel for the third time—that the apppellants' foreman did not ask him to point out the timber cut on lot 24; that he told the foreman he could do so, and that that person replied "he did not care where it came from, that he would draw it."

I am not prepared to accept these uncorroborated statements as a sufficient ground for an adjudication in the respondent's favour. In considering the weight to be given to them we are not reviewing the decision of the learned Judge who tried the case; for this point does not seem to have been presented to him, and he made no finding upon it.

When the surrounding circumstances are examined, I think it is not uncharitable to say that the respondent's assertion that he could distinguish between the pieces cut from the different lots, makes a great demand upon one's credulity. In his original examination he does not breathe the faintest suggestion that there was any difference between the marks stamped upon the pieces taken from the different lots. He says broadly: "I marked the timber, as I made it, R." Nor can any plausible reason be advanced for making any distinction.

The respondent's case necessarily is, that he cut the timber from lot 25 in the honest belief that he had acquired a title to the property. "He thought it as much his own as lot 24." They were for his purpose as one property. The mark R was undoubtedly used to designate the timber as that which the respondent was getting out under his contract with Mr. Ross, in whose name the deed to 24 and 25 had been taken by the respondent. The respondent did not in his evidence suggest any reason for making some mysterious and unexplained change in the shape of the R, when applied to the timber taken from lot 25, nor did the ingenuity of counsel avail to supply the omission upon the argument.

I cannot help adding that the respondent's assertion that the letter R (which he was speaking of as stamped upon all the timber), "did not mean Ross more than any other man," is not calculated to create a favourable impression of his candour.

For my own part, sitting now as a Judge of fact, I have no hesitation in holding that it is not satisfactorily established that he could distinguish and separate the different pieces.

But however that may be, whether he could or could not himself make such distinction and separation, I think the weight of evidence is, that he kept this knowledge, if he possessed it, locked in his own breast. As I have already pointed out, it was not until his third examination by his learned counsel that he stated that he told the appellant's foreman he could point out the timber cut on lot 24. Immediately before, in answer to the appellants' counsel, he had said he did not tell the foreman how to identify the sticks cut on lot 24. Still earlier he had said that he did not point out what was cut on 25, and what was cut on 24.

Jesse Shibley, a witness examined on behalf of the respondent, says, that the respondent did not offer to point out the timber cut on 24, and the appellants' foreman also denies that any such offer was made.

I do not think that in view of this evidence, and of the extent of the right which the respondent was then asserting, it would be proper to find upon his own testimony alone that he told the foreman he could point out the timber cut on lot 24. His statement might have worn a greater air of probability if he had at that time been laying claim only to the timber cut on lot 24. But he was then contending that all the timber was his—that cut on 25 as well as that cut on 24. That contention he persisted in at the trial and in term, and only abandoned upon the argument before this Court. It is to my mind clear that all the appellants' foreman sought was, to remove the same number of pieces as had been cut from 25. I see no reason for thinking that if the respondent had pointed out to him that number as having come from 25 he would have refused to take them.

As bearing upon this view the respondent's testimony in chief is not unworthy of remark. He said he was lumbering on lots 24 and 25: that he took 480 pieces of timber, white pine: that he drew it on Long Lake on the ice, about three miles from where it was cut: that the appellants sent a number of men and horses and drew

away 185 pieces ; and that the value was $1,102.25. In that examination he does not say one word as to how many of the 185 pieces were taken from lot 24. In a word, he was claiming all that the appellants had drawn away, and treating all that he had cut as one undivided quantity.

To my mind nothing can be more opposed to justice than the claim which the respondent asks the Court to sustain. The timber cut from both lots was, according to the respondent's own admission, all lying together. It was through his fault, however innocently, that the appellant's property and his were thus mixed. He made no effort which can fairly be characterized as reasonable to effect a separation. He has taken 51 sticks belonging to the appellants, who have taken out of the general mass 51 sticks of no greater value, belonging to the respondent.

And now it is gravely contended that a Court of justice should permit him to recover the value of his 51 sticks, and leave the appellants to bring another action to recover from him precisely the same amount of damages. I am glad to think that there is no such blot on our jurisprudence as the success of this contention would imply, and that we are administering law not less than justice when we allow the appeal with costs, and direct a verdict to be entered for the defendants.

Appeal allowed, with costs.

William Holmes et ux. v. Alexander W. Thompson.

Agreement to invest money for Plaintiff—Construction—Liability.

The plaintiff entrusted $500 to defendant, who signed a receipt, stating that it was to be lent, with $300 of his own, to one H., "being secured on the said H.'s storehouses," and in defendant's name, and bearing interest at 9 per cent, payable to defendant, who would, on receipt of the interest, pay to the plaintiff her interest, $45 per year, and at the expiration of two years defendant to pay over to plaintiff both principal and interest; but defendant not to be responsible for the money except as paid by H. to him. Defendant, who acted gratuitously, and, as he stated, under the advice of a solicitor, finding that H. had not yet obtained the patent, advanced the $800 to H. on the security of a bond, not registered, conditioned that H. should give him a mortgage on the property within a month after receiving the patent, or pay the money in two years; but H., after the patent issued, gave a prior mortgage to another person, and became insolvent. The declaration alleged that defendant promised to invest the money on the security of a mortgage on the storehouses, and defendant admitted that this was the agreement. It was argued that he was a gratuitous bailee only, and not shewn to have been guilty of negligence; but, *Held*, that it was a case of contract founded upon good consideration, the entrusting him with the money, and that having broken it he was liable.

Upon appeal this judgment was affirmed. The defendant, it appeared, without the plaintiff's authority, took a second mortgage upon the property, nearly two years after the bond, extending the time of payment for three years for the principal and accrued interest.

Held, that this was clearly such a breach of his agreement, and such a dealing with the plaintiff's money, as to make him liable. *Held*, also, that the plaintiff should recover interest at 9 per cent for two years only, and at 6 per cent thereafter.

Per Patterson, J., the agreement to "secure" the money upon the storehouses required defendant to obtain a valid legal charge thereon.

Semble, that defendant, not being an attorney, would not have been liable, if, having undertaken gratuitously to invest the plaintiff's money in a mortgage, he had instructed a competent attorney to attend to the matter, and relied upon his advice.

Declaration: First count: that, in consideration that the plaintiff Cynthia Holmes, previous to her intermarriage with the plaintiff William Holmes, at the request of the defendant, employed and retained the defendant as her agent to invest the sum of $500 by way of loan to one Joseph Hurssell, the same to be secured by a good and valid mortgage on the storehouses of the said Joseph Hurssell, situate on the south side of the Grand River in the town of Cayuga, said mortgage to be taken in the name of the defendant, and to bear interest at the rate of nine per cent. payable annually, the said principal sum to be repayable

at the expiration of two years from the date of the agreement, which period had elapsed before suit, and the defendant received the said sum of $500 on the terms aforesaid, the defendant promised the plaintiff Cynthia Holmes that he would invest the same by loan for her to the said Joseph Hurssell, on security of the said good and valid mortgage on the said storehouses, on the terms aforesaid; yet the defendant afterwards, without the consent of the plaintiff Cynthia Holmes, paid over the said sum of $500 to the said Joseph Hurssell, without taking any security therefor on the said storehouses of the said Joseph Hurssell, whereby the said moneys became wholly lost to the plaintiff.

The second count alleged that Cynthia Holmes, previous to her marriage, retained and employed the defendant to invest the sum of $500 on the mortgage security in the first count mentioned; yet defendant, after receipt of the money, wholly failed to invest the money on the terms and on the security aforesaid, and afterwards paid over the money to Joseph Hurssell without taking any security therefor on the said storehouses, whereby, &c., as before.

There were also the common *indebitatus* counts for money lent to the defendant, and for money received by the defendant for the use of the plaintiff Cynthia Holmes, and for interest.

The pleas were, to the first count: 1. Non-assumpsit. 2. Performance. 3. Did not pay over the money without taking security. To the second count: 1. Not guilty. 2. Denial of the retainer alleged.

There was, besides, a plea to the first and second counts, on equitable grounds, to the effect that the defendant received the money on the terms set forth in a written paper, signed by the defendant, and for or upon no other purposes or terms whatever, which paper was as follows:—

"MOUNT FOREST, Dec. 30, 1868.

$500. This is to certify that I have this day received from Mr. Charles Anderson the sum of $500, to be invested or loaned to one Joseph Hurssell, of Cayuga, with the following amount of $300 from the undersigned, making in all $800, being secured on the said Joseph Hurssell's store-

houses on the south side of the River, in the village of Cayuga, in the name of the undersigned, and bearing interest at nine per cent. from the above date, payable annually to the undersigned, who will, on receipt of the interest, pay over to the said Mrs. Charles Anderson the amount of interest due her ($45) per annum; and at the expiration of two years from date, the undersigned to pay over to the said Mrs. Charles Anderson both the interest due and principal. This document not binding nor to make the undersigned responsible for the money so lent the said Joseph Hurssell, only so far as money actually paid the undersigned by the said Joseph Hurssell on her, the said Mrs. Charles Anderson's, account.

A. W. THOMPSON."

That defendant was not, at the time of receiving the money, an attorney or barrister-at-law, or a member of the legal profession, or a conveyancer, and had no knowledge of, or practice in, the preparation of conveyances or securities for the purpose of securing money lent on real estate, as the plaintiff Cynthia Holmes then well knew: that having so received the money, he duly employed and instructed a competent attorney-at-law and solicitor of good standing and reputation, to prepare and cause to be duly executed a document for the purpose of securing the said money upon the said storehouses; and the said attorney being so employed and instructed, prepared and caused to be executed by the said Joseph Hurssell, a written document, as follows:—

Know all men that I, Joseph Hurssell, of the town of Cayuga, &c., am held and firmly bound unto Alexander Thompson, &c., in the sum of $1,600 of lawful money of Canada, to be well and truly paid, &c. Sealed this 30th December, 1868. Whereas the above bounden Joseph Hurssell has purchased from the Government lot No. 10 on the east side of Oneida street, &c., and has paid the purchase money to the Government, but the deed thereof has not yet been issued or received. And whereas the said Joseph Hurssell has this day loaned and borrowed from the said Alexander W. Thompson the sum of $800, to be repaid at the expiration of two years from the date hereof, with interest, &c., and for the better security whereof has agreed to give to the said Alexander W.

Thompson a mortgage on said lot in the usual form, and conditioned for the payments as above mentioned. Therefore, if the above bounden Joseph Hurssell his heirs or executors shall and do within one month after the receipt by him of a deed of said land, make, execute, and deliver at his and their own costs, a good and sufficient mortgage on said land to the said Alexander W. Thompson, his heirs, &c., securing the payment of the said moneys, then this obligation to be void; or in the event of such deed not being received before the expiration of the said term of two years, then, upon the payment of said moneys and the interest, as above mentioned, this obligation to be void, &c.

In witness, &c.

(Signed) JOSEPH HURSSELL.

Signed and sealed in the presence of

(Signed) T. H. AIKMAN.

That the said attorney then informed and advised the defendant that the said document was a good and safe security for the said purpose: that defendant, believing and relying upon such representation and advice, and having received the said document, did, in good faith and for the purpose of performing his promise and employment, pay over to the said Joseph Hurssell the said sum of $500 upon the security of the said document, together with the said sum of $300 belonging to the defendant: that immediately thereafter he informed the said Cynthia Holmes of what he had done, and explained to her the nature of the security upon which he had invested the $500, and offered to obtain the said sum of $500 back from the said Joseph Hurssell, and return the same to the said Cynthia Holmes if she was not satisfied with the said security but the said Cynthia Holmes refused the offer, and acquiesced in what the defendant had so done, and accepted the said security as a sufficient and satisfactory performance of the defendant's promise and employment; and that, except as aforesaid, defendant was guilty of no negligence or default in the performance of his promise, employment, or duty in receiving, or paying over, or investing the said $500.

There was another equitable plea to the whole declara-

tion, omitting the allegation of acquiescence, but in other respects apparently the same as the preceding.

There were also pleas of never indebted and payment to the common counts.

The plaintiffs took issue on the pleas.

The cause was tried at the Spring Assizes for 1875, before Galt, J., at Cayuga, without a jury.

The first witness called was the female plaintiff. She swore that defendant promised, if she would let him have the $500 for Hurssell, that he, defendant, would give his own bond for it and be responsible for the money; that he would add $300 to it, and take a mortgage in his own name on Hurssell's storehouse. She also swore that at the time defendant gave her the receipt for the money he told her he had paid the money to Hurssell; that he was unable at the time to get a mortgage, but had taken a bond, which, he had been advised by lawyer Aikman, would answer the same purpose as a mortgage; and that she gave defendant to understand that it was a matter entirely for his consideration. She did not admit that she had in any manner acquiesced in or approved of what defendant had done. She swore further that at the end of the second year defendant brought her a mortgage, dated 11th October, 1870, for $590, payable at the expiration of three years from date, and the interest annually at the rate of 9 per cent., from Hurssell, from which the covenants for title, &c., were erased, and that she refused to accept this mortgage, saying she would hold defendant responsible for the money. She said this took place in January, 1871. This mortgage was registered by the defendant on 24th of January, 1871, before he took it to her.

It appeared that the reason the covenants were erased was the fact of a prior mortgage made by Hurssell to the Imperial Building Society in August, 1870, for $1,250.

It also appeared that she was the same person as mentioned in the receipt as Mrs. Charles Anderson. She afterwards married the other plaintiff.

The receipt and bond set forth in the equitable plea were both proved.

The male plaintiff was also called as a witness. He corroborated the testimony of the female plaintiff as to the rejection of the mortgage and her account of what took place when she rejected it.

The defendant was called as a witness in his own behalf. He swore that his impression was, that he gave the receipt (the same as set out in the equitable plea) at the time he got the money: that he undertook at the time to procure a mortgage on the storehouse: that the reason he did not then get it was, because the patent had not issued to Hurssell; that, notwithstanding, he, on the advice of Mr. Aikman, let Hurssell have the money, taking the bond in the form set out in the equitable plea: that the understanding with Hurssell at the time was, that the money was to be paid back unless the female plaintiff was satisfied: that he afterwards explained to the female plaintiff what he had done, and she said she was perfectly satisfied: that the bond was not registered: that he was ignorant that the bond required to be registered: that he several times applied to Hurssell for the mortgage, but could not get it: that afterwards he got it, but did not at the time know it was a second mortgage: that had he known it was a second mortgage, he would not have accepted it: and that he never got a mortgage of any kind from the defendant for the $300 which he lent. He denied that he was to be personally liable for the money otherwise than mentioned in the receipt.

The next witness called for the defence was *Joseph Hurssell.* He corroborated defendant's statement as to having consulted Mr. Aikman about the sufficiency of the security, and swore the storehouses were at the time worth $4,000. He also proved the mortgage to the Imperial Building Society for $1,250 as a first charge on his property, and the execution of the second charge in favour of the female plaintiff. He swore that at the time the bond was drawn Mr. Aikman was his solicitor, and that he paid Mr. Aikman for the drawing of the bond.

The Deputy Sheriff, *Edwin S. Martin,* was also called as

a witness, and proved that in 1870 Mr. Hurssell's storehouses were in his opinion worth $3,000.

The wife of the defendant was also called as a witness on his behalf, and testified that in July, 1870, she was present at an interview between plaintiff and defendant, when defendant said, "I have seen Mr. Hurssell regarding that business," and plaintiff said, "All right."

Mr. Aikman, who is a practising attorney residing at Cayuga, was called as a witness in rebuttal, and swore that he had no recollection of advising in the matter, and then proceeded, "But if Mr. Thompson says I did, I suppose I must." He swore that the advice which he was alleged to have given would have been strange advice for him to have given. But he did not appear to have any distinct recollection about it. He stated his belief that the property mentioned in the mortgage was, at the time it was taken, a good security for the amount of the second, as well as the first, mortgage.

It also appeared that Hurssell, after giving the second mortgage, became an insolvent.

The learned Judge found, as a fact, that the plaintiff did not accept the bond in fulfilment of defendant's agreement, but entered a verdict *pro formâ* for the defendant, reserving leave to the plaintiff to move to enter a verdict for $790, or such smaller sum as the Court might direct.

J. R. Martin, during Easter term, May 19, 1875, obtained a rule *nisi* calling on the defendant to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff for the sum of $790, or such smaller sum as the Court might see fit, pursuant to leave reserved at the trial upon the law and evidence.

In Michaelmas term, November 29, 1875, *MacKelcan* shewed cause. Defendant is shewn to have been only a gratuitous bailee. He actually did take security for the plaintiff's money. The security taken was, according to the opinion of Mr. Aikman, as good as a mortgage. Defendant is not to

blame for having acted on that advice: the security taken was a good equitable mortgage, and would have been effective if registered. There was no duty on the part of defendant to register it. The equitable pleas were proved, and defendant not being shewn to be an attorney or professional man, the plaintiffs had no right, on the facts proved, to recover against him. He referred to *Dartnall* v. *Howard*, 4 B. & C. 345, 349; *Peters* v. *Weller*, 30 U. C. R. 4; *Chapman* v. *Chapman*, L. R. 9 Eq. 276; *McQuarrie* v. *Fargo*, 21 C. P. 478; *Giblin* v. *McMullen*, L. R. 2 P. C. 317, 336; *Moffat* v. *Bateman*, L. R. 3 P. C. 115; *Treffts* v. *Canelli*, L. R. 4 P. C. 277.

Richard Martin, contra, argued that defendant was sued, not as a gratuitous bailee, but as for breach of an express contract: that it was his duty under the contract not to loan the money except on the security of a mortgage: that he loaned it without taking a mortgage: that he knew at the time he was acting contrary to his duty, but seeks to excuse himself by alleging that what he did he did with the acquiescence of the plaintiff, which was denied by plaintiff: that Aikman was the solicitor of the mortgagor, and not of the defendant: that it was doubtful if he or any other lawyer ever gave the opinion imputed to him; but that even if he did, it was no excuse to defendant for the breach of his contract; and that the finding of the learned Judge had, in effect, disposed of the equitable pleas against the defendant. He referred to *Saunders* on Negligence, 156, 160, and the cases there mentioned.

February 4, 1876. HARRISON, C. J., delivered the judgment of the Court.

Mr. MacKelcan argued this case as if it were one of simple deposit of money for safe-keeping. No doubt in such a case the obligation is no more than to keep the thing deposited with reasonable care. In such a case the negligence for which the bailee is responsible is the want of that ordinary diligence which a reasonably prudent man would take of his own property of the like de-

scription. This is the principle established by *Giblin* v. *McMullen*, L. R. 2 P. C. 317, and other similar cases referred to by Mr. MacKelcan.

But, as argued by Mr. Martin, there is a difference between the obligation of a person under a special contract and the general obligation implied by law, from the mere nature of bailment.

If there be a promise, founded on a good consideration, the person promising must perform his contract, and is responsible for a breach of it, independently of the question of bailment and independently of the question of negligence.

In *Coggs* v. *Bernard*, 2 Ld. Raym. 909, it was held that the act of the owner, trusting the defendant with goods, was a sufficient consideration to oblige him to a careful management.

In *Lubbock et al.* v. *Inglis*, 1 Stark. 104, where A. directed the London Dock Company to deliver a quantity of hides belonging to him, in their custody, to B., the company was held liable for delivering the goods upon an order purporting to be the order of B., but which was a forgery.

A banker, on the same principle, who pays the money of his customer left with him on deposit to be paid on the cheques of his customer, is held liable if he pay the money on an altered or a forged cheque, or otherwise than on the order of the customer, although he used ordinary diligence at the time the money was paid: See *Hall* v. *Fuller*, 5 B. & C. 750, and other cases cited in *Beltz* v. *Molson's Bank*, in this Court, not yet reported.

If a person receive goods on a promise to deliver them to a particular person, and, in disregard of this promise, deliver them to a different person, he is liable for breach of his promise, whether in doing so he exercised care or diligence or not: See *Lichtenhein* v. *Boston and Providence R. W. Co.*, 11 Cush. 70; *Hall* v. *Boston and Worcester R. W. Co.*, 14 Allen 439.

If the person to whom the goods are consigned refuse to receive them, it would appear that afterwards the goods

remain in the possession of the carriers as mere bailees, subject to the exercise of ordinary and reasonable care: *Heugh et al.* v. *The London and North Western R. W. Co.*, L. R. 5 Ex. 51.

In *Treffts* v. *Canelli*, L. R. 4 P. C. 277, cited by Mr. MacKelcan, the defendants were relieved of liability on the construction of the contract, and not by reason of any question of diligence or negligence.

In *Stewart* v. *Frazier*, 5 Ala. 114, the defendant received money to be kept for the plaintiff without compensation, but from motives of kindness undertook to remit it by the hands of a person "reputed to be an honest man;" but the money was lost, and the defendant was held to be responsible.

So in *Kowing* v. *Manley*, 10 Am. 346, where property was delivered to the defendant under instructions to deliver it to no one without the plaintiff's written order, and defendant delivered it upon an order forged by the plaintiff's wife, defendant was held to be liable for breach of his promise.

So in *Jenkins* v. *Bacon*, 15 Am. 33, where the plaintiff, on the point of starting on a long voyage, requested the defendant to buy a government bond and keep it for him; and defendant promised to do so, bought the bond, and after keeping it a year, sent it, without the instructions of plaintiff, by mail to the plaintiff's wife, and it was lost on the way, defendant was held liable on counts in contract, although he was not to receive anything for his services.

These decisions are, I think, founded on a principle equally well recognized by the laws of England and the United States; and that principle is, that men who make promises founded on good consideration shall perform their promises, or be held liable in damages for breach of their promises.

The first count of the declaration here is that the defendant, when he received the female plaintiff's money, promised her that he would invest it by loan for her to Joseph Hurssell, on the security of a mortgage on Hurssell's store-

houses, and that in breach of his promise he paid over the money to Hurssell. Defendant has, by his pleas, denied his promise and denied the breach.

The promise is proved, not only by the testimony of the female plaintiff, but by the testimony of the defendant himself, and is not at all inconsistent with the receipt given by defendant for the money, which the female plaintiff swears was not given by the defendant at the time the money was delivered to the defendant.

The next enquiry is, whether defendant kept his promise. It is quite plain that he did not, and he attempts to excuse himself by alleging that what he did he did with the acquiescence of the female plaintiff.

We cannot give effect to his testimony on this point, opposed as it is by the direct and positive testimony of the female plaintiff.

The allegation of the defendant in his equitable pleas, that "except as aforesaid,"—that is, as I read it, except that he did not keep his promise—he was guilty of no negligence or default in the performance of his promise, cannot, I apprehend, afford a good answer either at law or in equity to an action for a breach of the promise.

The allegation in the first equitable plea, that the female plaintiff acquiesced in what the defendant did, and accepted the security (meaning, I suppose, the bond conditioned that a mortgage would be given,) as a sufficient security for the $500 and as a sufficient and satisfactory performance of the defendant's promise, which, in my opinion, is the only allegation in the plea that makes it a good answer at law as well as in equity, is found against the defendant by the learned Judge who tried the cause without a jury, and rightly so found on the evidence.

In my opinion, the rule must be made absolute to enter a verdict for the plaintiff for $790, pursuant to leave reserved at the trial.

Rule absolute.

From the foregoing judgment the defendant appealed, on the following grounds:—

1. The defendant did obtain for the plaintiff's money, as well as for his own, which was lent with it, a security upon the property mentioned in the declaration, which appears by the evidence to have been a good and valid security, and a sufficient fulfilment of the defendant's contract or obligation.

2. No breach of contract or actionable negligence on defendant's part is shewn by the evidence: *Ross* v. *Strathy*, 16 U.C.R. 430; *Giblin* v. *McMullen*, L. R. 2 P. C. 347, 336.

3. The defendant, acting gratuitously and not being an attorney or conveyancer, was not bound to see that the security taken upon the property designated was sufficient in point of law, but was justified in acting on the advice of an attorney as to the sufficiency thereof: *Dartnall* v. *Howard*, 4 B. & C. 350; *Chapman* v. *Chapman*, L. R. 9 Eq. 276; *McQuarrie* v. *Fargo*, 21 C. P. 478.

4. The bond taken by the defendant was in effect a good and valid security by way of mortgage upon the property in the declaration mentioned.

5. There is no evidence that the security taken is insufficient.

6. The plaintiffs have not shewn any damage suffered by reason of any default or negligence on the part of the defendant, and if the Court should be of opinion that the plaintiffs are entitled to recover, a verdict could be entered for them for nominal damages only. A verdict for the defendant will not be set aside for the purpose merely of entering a verdict for the plaintiffs for nominal damages.

7. The receipt given by the defendant must be held to contain the whole contract on his part, and no breach of this contract is shewn by the evidence.

8. The seventh plea was proved, and the defendant is entitled to a verdict upon it.

The plaintiffs' reasons against the appeal were:—

1. Those contained in the judgment appealed from and the authorities therein cited.

2. The defendant did not invest the moneys in the declara-

tion mentioned on a good and valid security on the property in the declaration mentioned, but made default.

3. The learned Judge at the trial found that defendant failed in his contract and that the plaintiffs did not consent thereto, and the Court in term having confirmed the finding, it should not be disturbed, being fully supported by the evidence.

4. The defendant not being an attorney affords him no protection against his breach of contract in not investing in accordance with his undertaking.

5. The bond taken by defendant was not in effect a good and valid security by way of mortgage upon the property in the declaration mentioned, and was not a fulfilment of his contract, and was useless to the plaintiffs even as a protection, by reason of want of registry, whereby the obligor was enabled to, and did encumber the said property to the full value thereof, as against the said bond.

6. The evidence proves that the security, if any, taken is wholly worthless and not in accordance with defendant's agreement.

7. The evidence shews that the property, upon the security of which the plaintiffs' money was to be invested or loaned, has been mortgaged to the Imperial Building Society for its full value, such mortgage being the first mortgage on the same, and that the mortgagor, Hurssell, has become perfectly insolvent.

8. That even if the receipt given be the whole contract, which the plaintiffs contend is not the case, the undertaking and agreement therein contained on the part of the defendant is wholly broken by the defendant.

9. That the seventh plea is not proved—in fact, the attorney therein mentioned was the attorney of Hurssell and not of the defendant—and is an immaterial issue both at law and in equity.

June 21, 1876. The appeal was argued (*a*) for the appellants by *C. Robinson*, Q. C., and *MacKelcan*, Q. C., and by *J. R. Martin*, Q. C., for the respondents.

(*a*) Present.—DRAPER, C. J. of Appeal; BURTON, J.; PATTERSON, J.; Moss, J.

The argument was the same, in substance, as that in the Court below.

June 29th, 1876. BURTON, J.—The defendant is not charged in either count as an attorney, or in any special character, nor is the retainer alleged to be for reward; and the seventh plea, which professes to set out the receipt given by the defendant to the female plaintiff for the money handed to him by her, alleges that that receipt correctly sets forth the terms on which the money was received by the defendant, viz: to be invested or loaned by him to one Hurssell, with moneys belonging to himself, on the security of Hurssell's storehouses, in Cayuga, in his, the defendant's, name, with interest at 9 per cent., payable annually to him, he binding himself on receipt to pay it to the female plaintiff, and the principal at the end of two years; but with the stipulation that defendant was not to be liable except for moneys actually received.

The plea then avers, as would in fact be assumed upon this declaration, that the defendant was not an attorney, and that having so received the money he employed a competent practising attorney of good standing and reputation to prepare a document to secure the amounts so proposed to be loaned upon the storehouses: that the attorney prepared, and caused to be executed by Hurssell, a document which the attorney advised him was a good and safe security for the said purpose; and relying upon that information and advice, he in good faith, and for the purpose of performing his promise and employment, paid over the money given him by the female plaintiff, together with his own; and that, except as aforesaid, he was guilty of no negligence or default in the performance of his promise, employment, or duty, in receiving, investing, or paying over the said sum so received.

I should have thought, although for the reasons presently given it is not necessary to decide it, that upon demurrer this plea would have been a perfectly good answer to the special counts of the declaration; and I do not attribute to

the words "except as aforesaid" the meaning the learned Chief Justice of the Queen's Bench places upon them.

The meaning which I think is to be given to the plea is this: "I did not receive these moneys as an attorney, and therefore any duty which would arise from my receiving them in that character cannot be attributed to me. I received them from you simply as a personal friend, to be invested upon the security of Hurssell's storehouses, as I proposed to invest my own, without any remuneration. That I did faithfully and honestly seek the advice of an attorney competent to transact such matters, and took what he advised was a sufficient security within the meaning of my engagement with you. If that is negligence, I admit it; but beyond that I was guilty of no negligence or default." So read, I do not see why it should not furnish a complete answer to the plaintiffs' demand, if proved. But it is said that even if it be an answer it is not proved, first because the defendant admits that he knew that the bond which he accepted from Hurssell was not in accordance with the agreement; and, second, because the evidence shews that he was guilty of negligence or default in addition to the facts admitted in the plea, and which the plea professes to justify.

If it had appeared upon the face of the pleadings that the defendant had gratuitously undertaken to invest these moneys to the best of his skill, when his situation or profession were such as to imply skill, an omission of that knowledge or skill would be imputable to him as gross negligence. But when, as appears upon the pleadings and evidence here, the defendant was not skilled in the matter he undertook gratuitously to perform, the fair interpretation to put upon the contract, it appears to me, is, that he will take the same means and use the same care and diligence which a prudent and discreet man would do in acting for himself—that is, that he will place the matter in the hands of some competent person whose special business it is to attend to such matters. If, therefore, the seventh plea had been fully sustained in evidence, I should have

said that it afforded a complete answer to the plaintiffs' complaint, and that it would not have been material to enquire whether the security taken was or was not an effectual lien or charge upon the storehouses.

He did not in terms undertake to procure the specific security alleged in the declaration; and if he employed a competent person to secure the loan, it appears to me that that is a sufficient performance to satisfy his engagement. It is not, however, necessary, in the view I take of this case, to consider that point, as I am of opinion that the defendant was himself aware that the bond referred to in the plea was not such a security as was stipulated for; and that he did, by a *positive act*, to which the female plaintiff was no party, accept a mortgage on a portion only of the property referred to in the agreement, and extend the time for payment beyond the period originally agreed on. It seems to me that this was a dealing with the female plaintiff's property which was wholly unauthorized, and which entitles her to recover the full amount entrusted to him, and interest—it is not, perhaps, material to enquire whether under the common counts or not. The defendant, it is true, was not to be responsible for any moneys which did not actually come into his hands, and if the investment upon the bond was warranted, he would not have been liable on the mere failure of Hurssell to pay, to make good the amount; but that would not justify him in forcing upon the female plaintiff a security payable at a much later date. I do not see how it is possible, under this state of facts, to avoid the conclusion that the defendant has made himself liable. No reason is assigned, and no explanation given, for the defendant altering the terms of payment in this mortgage; nor does it appear to have been noticed either at the trial or in the Court below; but it seems to me to be such a positive dealing with the female plaintiff's property as to preclude us from affording to the defendant any relief from the verdict which the Court below has directed to be entered, although it should be reduced.

PATTERSON, J. The plaintiffs declare upon a promise by defendant to the female plaintiff, *dum sola*, to invest for her the sum of $500 by way of loan to one Hurssell, on security of a good and valid mortgage on storehouses of Hurssell, taken in defendant's name, interest at 9 per cent to be payable annually, and the principal at the expiration of two years from the date of the agreement; and the breach charged is, that the defendant lent the money to Hurssell without taking any security therefor, whereby the female plaintiff lost her money. There is a second count which does not differ in effect from the first, and a money count.

The pleas raise the questions, what was the duty of the defendant—and did he discharge that duty?

The facts are either apparent on the evidence or found by the learned Judge who tried the cause.

In December, 1868, Mrs. Holmes, then Mrs. Anderson, asked defendant if he knew where she could loan $500, and he told her that Hurssell wanted $800, and proposed to add $300 of his own to her $500, and lend the whole to Hurssell, to which Mrs. Anderson agreed. She gave the $500 to defendant and took from him a receipt in these words: [Here the learned Judge read the receipt set out ante p. 293–4.]

Hurssell, though entitled to the patent from the Crown for the land on which the storehouses stood, had not actually obtained it; and the defendant therefore took his bond for the making of a mortgage to secure the money and interest on the agreed terms within a month after the patent should have issued, or to repay the money and interest in case the patent did not issue in two years, and upon the security of that bond, he advanced the $800.

The defendant states that he did not consider that the bond was according to the agreement; and accordingly he directs his evidence to shew that Mrs. Holmes consented to the bond being taken. The learned Judge finds that she "did not accept the bond as a fulfilment of the agreement."

Mrs. Holmes was willing to extend the loan for two years longer on a mortgage to herself, which would include

the principal and accrued interest, as appears from defendant's evidence, which she does not contradict. The defendant did not procure her such a mortgage. He procured one in October, 1870, which extended the time for *three* years, and was, moreover, only a second mortgage, as Hurssell had, in the previous August, mortgaged the property to a building society. Mrs. Holmes refused to accept the mortgage when it was offered to her by the defendant; and she brings this action to recover her $500 and interest.

At the trial a verdict was entered for defendant, with leave to the plaintiff to move to enter a verdict for $790, or such smaller sum as the Court should direct; and the Court of Queen's Bench made absolute a rule to enter a verdict for $790.

From this judgment the defendant appeals.

I do not think any good reason has been shewn for interfering with the judgment.

The agreement evidenced by the receipt given is, in the first place, to *secure* the money on the storehouses of Joseph Hurssell. In my opinion, this must be construed as meaning to secure by means of a charge on the legal estate. For the purpose of either proving the agreement or construing the writing I do not think we can resort to the verbal evidence given, whether given to shew what the parties agreed to, apart from the writing, or what they understood or meant to express by the word *secure*.

The agreement having been reduced to writing, the familiar rules apply, which I quote from *Taylor* on Evidence, 6th ed., sec. 372, and sec. 1088, viz.: "Oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing," and, "In no case, therefore, except * * where the description in the document would equally apply to any one of two or more subjects, or where the object is to rebut an equity, is it permitted to explain the language of a written instrument by evidence of the private views, the secret intentions, the known principles, or even the express parol declarations of the writer; but, in all cases alike, the

Court must expound the instrument in strict accordance with the language employed."

Looking only at the language of this instrument, I think we must read the word "secure" in the same sense as if it occurred in an agreement by the borrower to *secure* the money on his estate. In that case, I have no doubt he would not satisfy his agreement unless he effected a valid legal charge. We have not been referred to any case in which a construction has been put on the word "secure" in such an agreement; but the principle which is well settled as governing agreements to sell land, or to assign a lease, or to let land, would seem to apply, in all of which cases, the agreement is implied to make a good title: *Souter* v. *Drake*, 5 B. & Ad. 992; *Doe Gray* v. *Stanion*, 1 M. & W. 695; *Stranks* v. *St. John*, L. R. 2 C. P. 376.

But while we cannot use the parol evidence as aiding the construction of the instrument, it is satisfactory to know from the defendant's own evidence that he himself understood it as I have construed it, for he shews distinctly that he contemplated a mortgage as the security to be obtained, and considered, or was advised, that until Hurssell obtained the legal estate by the issue to him of the patent from the Crown he could not give a mortgage. It was unfortunate that a mortgage was not taken and registered under Consol. Stat. U. C. ch. 80, sec. 24; as this, although it might not have in the first place been a fulfilment of the contract, would have preserved its priority over a subsequent mortgage; and might, when the patent issued, have enured by estoppel to complete the legal estate in the mortgagee.

Even if the bond which the defendant took could have been treated as a security on the storehouses, the contract must still, as I construe it, be treated as broken; because, although it was in the first place an agreement to take security, it did not stop there. The latter part of the document contains an important part of the contract: "And at the expiration of two years from date, the undersigned to pay over to the said Mrs. Charles Anderson both interest

due and principal. This document not binding or to make the undersigned responsible for the money so lent the said Joseph Hurssell, only so far as money actually paid the undersigned by the said Joseph Hurssell, on her, the said Mrs. Charles Anderson's account." I read this as an agreement to return the money and interest at the end of two years, unless it should at that time be invested on the agreed security. There is no question that, at the end of the two years, the money was not invested on the agreed security. The bond, whatever it had originally amounted to, had been cut out by the Building Society's mortgage; and had had its effect further impaired by the defendant's own act in taking the mortgage to Mrs. Holmes; and the only security was, therefore, that mortgage, which certainly was not within the terms of the agreement, and which Mrs. Holmes had refused to accept. Under these circumstances, there was a further breach of the agreement, which entitled the plaintiffs to recover the money, either on a special count upon the agreement, or as money lent, or money received to plaintiffs' use.

I am inclined to the opinion that the plaintiffs could recover on the money count. In the case of *Bristowe* v. *Needham*, 9 M. & W. 729, money had been advanced on an agreement to repay it on demand, or to execute a mortgage to secure it. It was held that on a refusal to execute the mortgage the money could be recovered on the common count for money lent. But even if a special count should in strictness be required, an amendment would remove the technical objection.

The defendant being liable in this latter view of the contract, for neither paying over the money nor having it properly secured at the expiration of two years, it is not very material to enquire whether his having acted through or on the advice of an attorney in taking the bond, can relieve him from the charge of having failed to secure the money as required by the true reading of the contract, as well as by his own understanding of it. The point is raised by the seventh plea, which is in effect that the money was

received by the defendant in the terms set forth in the written receipt: that defendant was not a legal practitioner: that he instructed an attorney "to prepare and cause to be duly executed a document for the purpose of securing the money upon the storehouses": that the attorney prepared the bond, and advised the defendant that it was a good and safe security for the purpose: that the defendant, relying on that advice, in good faith, paid over the female plaintiff's money to Hurssell, together with his own $300; and that, except as aforesaid, he was guilty of no neglect or default in the performance of his promise.

All that defendant is here alleged to have done is, to have retained an attorney to *prepare a document* for the purpose of securing the money on the storehouses, and not *to see that the money was secured*, which would have involved an inquiry into the title. And not only is the plea thus insufficient, but the defendant in his own evidence shews that he knew he was not taking the proper security.

He says: "I then went with Mr. Hurssell to Mr. Aikman's office; Hurssell said he had paid the Government for the land, but had not yet received his patent; I said the understanding with Mrs. Holmes was, that I was to get the mortgage drawn up in my name for the $800; he said he would give a bond for a mortgage; I asked Mr. Aikman if the bond would be as safe as the mortgage; he said it would; and, *as I expected it would be only for a short time*, I accepted it, and he executed the bond; and I paid him the money with the understanding that if it was not satisfactory to the plaintiff, he would refund the money and I would give him the bond back. I told her Hurssell had not got his deed for the land, and that he could not at present give me a mortgage, but that I had taken a bond until he would get the deed and a mortgage could be made."

I do not say that the defendant would be responsible if, having undertaken gratuitously to invest the plaintiff's money in a mortgage, he had instructed his attorney to effect the security, and through some negligence of the attorney an insufficient security had been taken. The un-

dertaking might reasonably be understood as being only to do what in the ordinary course of the prudent management of business would be done. No such case, however, is made here by either the plea or the evidence.

The defence under this plea fails also on the further ground, that, while pleaded as an answer to the counts which charge the duty only as a duty to take a good mortgage, it sets out the whole contract, which extended, as I have already shewn, to the repayment of the money at the end of two years, if not *then* secured on the storehouses; and the latter part of the contract is only answered by the general statement that, except in the taking of the bond under the circumstances pleaded, there was no default. The evidence shews that there was a further default; and the defence then takes this shape: "I did not agree to take a mortgage as mentioned in the declaration; what I agreed to do was only to lend the money on the security of the property, and that I substantially performed; but I further agreed that, at the end of two years, either the money or the security should be forthcoming, and I do not shew that I have either of them."

The evidence given by the defendant is further directed to shew that when he informed Mrs. Holmes of his having taken the bond, she acquiesced in what he had had done. The plea to which this is applicable is the sixth, which differs from the seventh only in alleging this acquiescence. Judging merely from the evidence as I read it in the appeal book, I should have been very much inclined to think the acquiescence established; and I should infer it to a considerable extent from the evidence of Mrs. Holmes, as well as from that of the defendant.

We must accept the finding of the learned Judge who tried the cause, as deciding that in fact she "did not accept the bond in fulfilment of the defendant's agreement;" and taking that finding as it is expressed, I entirely agree with it.

If it were meant as a finding that Mrs. Holmes did not approve or consent to what the defendant did in taking the bond as that which was the best that could be done at the moment, and did not give him to understand that she was satisfied with the advance of the money on the temporary security of the bond, I should find it very hard to take that view of the evidence. I do not think the question is one of credibility or of conflicting evidence, because, to take the view that she did not assent, it would be necessary not exactly to disbelieve Mrs. Holmes in what she says, for that would be merely erasing her evidence; but to draw from her evidence an inference contrary to what seems to me the natural and fair one. I should have been strongly inclined to hold the sixth plea proven, if the taking of the bond had been the only matter to be answered by it. Unfortunately for the defendant, his agreement went further, and could not be satisfied without having, at the end of two years, either the money or security. In this sense, I understand and coincide with the finding that Mrs. Holmes did not accept the bond in fulfilment of the agreement.

On the question of damages we have not to consider the value of the property. The plaintiffs being entitled to the money, the value of the property is of interest only to the defendant, who may have to look to it for his indemnity.

I think the plaintiffs should recover the $500 with 9 per cent. interest for two years—say $590, due as of 30th December, 1870; and 6 per cent. interest from that time on $590, say for four years and three months-and-a-half, to the date of the verdict. I make the whole amount $742. I think the verdict should be reduced to that amount, and with that variation of the rule absolute, the appeal should be dismissed with costs.

Moss, J.—The receipt of 30th of December, 1868, must be taken to embody the terms of the contract entered into, or the duty accepted by the appellant. By that instrument he undertook to invest or lend to Hurssell the respondent's

$500 together with $300 of his own money, "making in all $800, being secured on the said Joseph Hurssell's store-houses" in the name of the appellant. The loan was to be for a period of two years, with interest annually at the rate of 9 per cent. The language I have quoted *primâ facie* imports a first mortgage upon freehold property. That is the sense in which it would be understood if there were no surrounding circumstances to modify or alter its import. That is the sense in which it was understood by the appellant, as appears from his own evidence, which I take to be admissible.

He states that after giving the respondent the receipt he went with Hurssell to the office of an attorney named Aikman: that Hurssell said he had paid the Government for the land, but had not yet received his patent: that he, the appellant, said the understanding with Mrs. Holmes, the respondent, was, that he was to get the mortgage drawn up in his name for the $800: that Hurssel said he would give a bond for a mortgage: that he, the appellant, asked Aikman if the bond would be as safe as the mortgage, and Aikman said it would be; and that as he, the appellant, expected it would be only for a short time he accepted it, and paid the money with the understanding, that if it was not satisfactory to Mrs. Holmes the money should be refunded and the bond returned: that he did not consider the bond was according to the agreement, and that was the reason he made the stipulation about the respondent's consent. He then proceeds with a narrative of what afterwards occurred between him and the respondent with reference to her acceptance of the bond, her willingness to allow the money to remain with Hurssell, and other matters designed to shew acceptance of the security and acquiescence of the respondent; but as the learned Judge who tried the cause found that issue against the appellant, presumably upon a consideration of the weight to be attached to their repective testimonies, it would serve no useful end to subject it to any scrutiny. The decision of that question was peculiarly

within the province of the learned Judge, and it is quite out of the question for us, upon any comparison of the conflicting testimony or any nice balance of probabilities, to interfere with his finding.

It may be added that the appellant manifestly thought that his duty required him to procure the security of a first mortgage; for in speaking of the mortgage which he afterwards assumed to get from Hurssell to the respondent herself, he declares that if he had known it was a second mortgage he would not have accepted it.

The case then seems reduced to these elements:—The appellant's obligation or duty was to lend this money upon the security of a first mortgage of these premises; the premises being still unpatented, he allowed himself to be guided by the advice of Aikman, who was acting as Hurssell's attorney, that the bond was as good security as a mortgage; he took the bond, but did not register it or procure the respondent's acceptance of it as equivalent to the mortgage; he did nothing further to improve the position of the security, except by occasionally asking Hurssell and his attorney Aikman whether the patent had been issued; Hurssell in August, 1870, and no doubt after the issue of the patent, although that date is not stated in the case, mortgaged the premises to a building society to secure a considerable sum, and this mortgage has obtained priority over any charge that might have been created by the bond; in October, 1870, the appellant, without reference to, or authority from the respondent, procured a mortgage from Hurssell to secure $590 with interest at 9 per cent. per annum, the principal being made payable on 11th October, 1873, and the interest annually; this mortgage was registered by the appellant, but was wholly repudiated by the respondent. The question is, whether upon this state of facts the appellant can be held to have discharged his duty and fulfilled his obligation?

I do not think that the appellant can successfully maintain the affirmative. He manifestly departed from the strict line of his duty when he accepted the bond, instead

of requiring the mortgage. It is a well established principle in the case of trustees that when they depart from this line, although from the best intentions, they must bear any consequent loss, however unexpected the result, and however little likely to arise from the course adopted—success alone justifies any deviation from the narrow path of duty. That principle I conceive to be applicable to a person charged with the duty the appellant assumed.

It was argued that the bond was sufficient to create a perfectly good equitable charge upon the land, and that all that was wanted to make it effectual was registration, for the omission of which the appellant could not be deemed responsible, because Aikman had not informed him of its necessity or propriety.

I think there can be no doubt that the bond did create an equitable charge, enforcible against Hurssell, or any one taking under him with notice, and that *Holland* v. *Moore*, 12 Grant 296, and *Vance* v. *Cummings*, 13 Grant 25, shew that it was capable of registration. If it had been actually registered, this difficulty would not have arisen, for a mortgagee after patent would have held subject to this charge by reason of the notice imputed by the registration.

We may well infer that if the appellant, instead of being content to advance the money on the temporary security of the bond, and in reliance upon a proper mortgage being soon executed, had insisted upon Hurssell first putting himself into a position to give and giving a proper mortgage, the appellant would also have required registration of the mortgage. He might not know that the bond in order to be really effectual as a security ought to be registered, or even that it was capable of registration, but, man of business as he is, he could not fail to know that it was only a reasonable and prudent precaution to have an ordinary mortgage registered. Indeed, he has shown some indication of possessing that knowledge, by his registration of the mortgage which he actually obtained, although it is of course barely possible or conceivable that he had only acquired this knowledge shortly before.

An ordinarily prudent man, charged with the duty which the appellant had undertaken, would have required the borrower to obtain his patent before completing the loan. There is no suggestion either in the evidence or on argument of the existence of any real impediment. If the appellant had simply declined to part with the money until the patent was procured, we may feel certain that it would soon have been obtained, especially if the purchase money had already been fully paid to the Crown. But if the reason why the patent had not been issued was that which the respondent swears the appellant assigned, namely, that this very money was to be used in paying the Crown, it was surely culpable negligence on the appellant's part not to see that the requisite amount of the loan was applied to that purpose.

These considerations would, I think, have sufficed to make the appellant responsible; but his subsequent conduct in taking the mortgage from Hurssell places his liability beyond doubt. By that mortgage he extended the time for repayment of the principal until October, 1873, and he consolidated with the principal the interest past due. He does not pretend that he had the respondent's sanction for thus dealing with her money. She had never consented that the loan should be continued to such a period, or that the payment of interest should be thus postponed; on the contrary, she promply repudiated the appellant's action. She is entitled to say that while the authority she had apparently given the appellant was so ample that she could not as against Hurssell refuse to recognize the extension, yet as between herself and the appellant he had exceeded his authority, had dealt with her money in a manner wholly unauthorized, and had made the loan in effect his own. In short, after having undertaken that either the money or a sufficient mortgage should be forthcoming at the end of two years, he puts it *ex mero motu* out of his power to insist upon Hurssell doing one thing or the other at the stipulated time. The result of this is to give her the right to reclaim her money immediately, and to insist upon the appellant assuming the mortgage.

Some stress was laid by the learned counsel for the appellant upon the circumstance that he had advanced his own money upon the same security, but the principle affirmed in *Doorman* v. *Jenkins*, 2 A. & E. 256, shews that this of itself is no excuse. Carelessness in regard to his own property does not justify the want of proper care of property with which he was entrusted.

DRAPER, C. J., concurred.

Appeal dismissed with costs.

MATTHEWS v. TIMOTHY E. CRAGG, EXECUTOR OF ISAAC CRAGG.

Bond to remove cloud on title—Excuse for non-performance—Time, when of the essence of the contract—Damages.

The plaintiff declared against the executor of C., on a joint and several bond executed by C. and W., reciting that the plaintiff had agreed to purchase from W. certain land in fee simple free from all incumbrances, and that C. had conveyed the land to one K., deceased, having made a previous conveyance to W., by which conveyance to K. a cloud upon the title was created; and the condition was, that C. should within two months procure from K.'s representatives a conveyance of all their interest in the land to the plaintiff, or in case of their being unable to execute such conveyance by reason of any disability, should within said two months take such proceedings as would remove said cloud, and within that time remove the same, and make and complete a good, absolute, and clear paper title to said land free from all incumbrances. Breach, that neither C. nor W. did within said two months or at any time, procure such conveyance from the representatives of K., nor had such proceedings been taken, nor said cloud removed, nor a good title, &c., made.

Plea, on equitable grounds, in substance, that the deed from C. to K. was made by mistake, and K. in the same way mortgaged back to C.: that C. before this deed and mortgage had conveyed to W. in fee, and W. to the plaintiff, who was aware of the title and bought from W. on the understanding that proceedings should be taken to foreclose said mortgage, on which default had been made, in order that C. might execute a quit claim to the plaintiff: that C. accordingly proceeded to foreclose the mortgage, but before foreclosure C. died, whereby the proceedings were suspended until revival of the suit in the name of defendant as executor; but they were afterwards conducted to a final decree without delay. And defendant alleged his readiness and willing-

ness to release all K.'s interest in the land to the plaintiff and that in fact there was and is no cloud on the title, the deed to W. having been executed and registered before the conveyance to K.

Held, reversing the judgment of GALT, J., that the plea was bad, for although the conveyance to K. was, under the facts alleged, no cloud upon the title, defendant could not set this up as an excuse for non-performance of his express contract to remove it, and make a clear title to the plaintiff within a specified time.

Semble, per HARRISON, C. J., that in such a case time would be of the essence of the contract in equity as well as at law.

DEMURRER: Declaration, that Isaac Cragg in his lifetime, and one Robert Walker, by their bond, bearing date the 1st day of September, 1873, became jointly and severally bound to the plaintiff in the sum of $1,000, &c., subject to a condition whereby—after reciting that the plaintiff had agreed with the said Robert Walker for the purchase from him in fee simple, free from all incumbrances, of a tract of land described, &c., and that Isaac Cragg did, by indenture dated on or about the 14th day of March, 1872, convey the said land to one Isabella Knowles, who had departed this life before the date of the said bond, the said Isaac Cragg having made a previous conveyance thereof to the said Robert Walker, and that by the said conveyance to the said Isabella Knowles a cloud was created upon the title to the said lands—the condition of the said bond was declared to be, that if the said Isaac Cragg and the said Robert Walker, or either of them, should, within two months after the date thereof, procure from the representatives of the said Isabella Knowles a conveyance of all their right, title, and interest in and to the said lands to the plaintiff, or in case of the said representatives being unable to execute such conveyance by reason of any disability, then if the said Isaac Cragg and the said Robert Walker, or one of them, would, within the said two months, take such proceedings as would remove the said cloud upon the said title, and would within the said two months remove all clouds upon and objections to the said title, and in every other respect make and complete a good, absolute and clear paper title to the said lands, free from all incumbrances whatsoever, then the said bond should be void, otherwise,

&c. And for a breach of the condition, the plaintiff says that Isaac Cragg and Robert Walker did not, nor did either of them, within the said two months, or at any time before this suit, or ever procure, nor has the defendant procured, from the representatives of the said Isabella Knowles a conveyance of their right, title, and interest in and to the said lands; nor have there been taken such proceedings as would or did remove the said cloud upon the said title, nor have there been removed all clouds upon and objections to the said title, nor has there been made and completed a good, absolute, and clear paper title to the said lands, free from all incumbrances; but the defendant and the said Isaac Cragg and Robert Walker herein have failed and made default.

Plea, upon equitable grounds, that previous to the making of the bond the said Isaac Cragg had, by the indenture in the declaration mentioned, sold and conveyed certain lands, and, among others, by mistake, the said land to the said Isabella Knowles, her heirs and assigns, and to secure the payment of the purchase money of the lands so sold, the said Isabella Knowles re-conveyed the lands so sold and conveyed to her, and, among others, the said lands, by deed of bargain and sale by way of mortgage to the said Isaac Cragg, his heirs and assigns, and which said last mentioned deed was subject to a proviso to make the same void on payment of the mortgage money therein mentioned; and the said Isaac Cragg, before the making of the said conveyance to the said Knowles and the said mortgage, assigned and transferred to the said Robert Walker, his heirs and assigns, all the right, title and interest of the said Isaac Cragg in the said lands, and the said Robert Walker conveyed the said lands to the plaintiff, who then had full knowledge of the title to the said lands, and bought the same from the said Walker upon the understanding and agreement that proceedings should be taken to foreclose the said mortgage, default having been made in payment of the mortgage money, and thereby revest the lands so by mistake conveyed to the said Knowles, as well

as the other lands sold to her by the said Cragg, in order that the said Cragg might execute a quit claim to the plaintiff in the bond mentioned: that in accordance with the said understanding and agreement the said Cragg took proceedings to foreclose the said mortgage without delay, and before the said mortgage and the said mortgagor, the said Knowles, were finally foreclosed the said Isaac Cragg died, whereby the said foreclosure proceedings were suspended until the said foreclosure suit was revived in the name of the defendant as executor, and the proceedings were thus conducted to a final decree of foreclosure without delay, and no delay has occurred in the foreclosure proceedings except what was absolutely unavoidable by reason of the death of the said Isaac Cragg; and the defendant is ready and willing to release and quit claim to the plaintiff all the estate, right, title, and interest of the said Knowles in the said land; and, in fact, there was and is no cloud upon the title of the plaintiff to the said land, and no title therein was claimed by the said Knowles, the same having been conveyed to her by mistake after the previous conveyance of the same to the said Walker and the registration of the conveyance to him.

Demurrer to the plea, because:—

1. The plea does not shew that the defendant or Isaac Cragg in his lifetime, and the said Robert Walker, or either or any of them, did, within the said two months, or within any reasonable time after the date of the bond, procure a conveyance from the representatives of Isabella Knowles of the said lands, or that their so doing was prevented by any disability of such representatives, or that there existed any such disability, and that such proceedings were within the said two months, or within a reasonable time after the date of the bond, had or taken, as would remove the said cloud upon the title to the said land.

2. The plea does not disclose that within the said two months, or within a reasonable time after the date of the bond, all clouds or objections to the title were removed, or that a good, absolute and clear paper title to the land was

made and completed, free from all incumbrances, or that a reasonable time for so doing had not elapsed before the commencement of this suit.

3. Assuming the foreclosure to have taken place, a release and quit claim, such as mentioned in the plea, would not have the effect of removing the said cloud upon the title and of removing all clouds upon, and objections to the title, and of making and completing a good, absolute, and clear paper title to the land, free from all incumbrances; and the defendant is prevented from saying that the conveyance to Isabella Knowles and the registration thereof did not and does not constitute a cloud upon the said title, by his executing the bond, as in the declaration mentioned.

4. The plea professes to be an answer to the whole declaration, and it answers only to part of it.

5. The understanding or agreement mentioned in the plea is inconsistent with the terms of the bond as disclosed in the declaration, and the said plea does not disclose any equitable or legal ground for setting aside or varying the terms of the said bond.

Joinder.

This case was originally argued with the case of *Matthews* v. *Walker*, 26 C. P. 67, an action against the other obligor in the same bond, in the Court of Common Pleas, before Galt, J., alone, on September 7, 1875.

T. Ferguson, for plaintiff.
M. C. Cameron, Q. C., contra.

The arguments are the same as in *Matthews* v. *Walker*, 26 C. P. 70, 71.

September 10, 1875. GALT, J.—The pleadings in these cases are the same. The declaration is on a bond given to the plaintiff under the following circumstances. [Here the learned Judge set out the pleadings, and proceeded.]

It is manifest that there was in reality no cloud on the title of Walker at the time that he conveyed to the plaintiff. When Isaac Cragg conveyed to Walker he had a perfect right so to do, and as Walker's deed was recorded

before the conveyance to Knowles by mistake, as is averred in the plea, and admitted by the demurrer, no conveyance by him subsequently can be considered as a cloud on Walker's title. It was, however, argued by Mr. Ferguson that the defendant was estopped from saying that it was not a cloud upon the title owing to the recital in the bond; but it appears to me that when all the facts of the case are brought before the Court, and I am called upon to say whether, as in the concluding part of the condition, the defendant has or has not made and completed a good, absolute, and clear paper title to the said lands, free from all incumbrances, I am called upon to decide that question as a Court of equity would do.

We must treat this action in the same way as if it were a suit to compel the defendant to remove what is alleged to be a cloud on the title.

In *Hurd* v. *Billinton*, 6 Grant 145, which was a bill filed to remove a conveyance which was void as a cloud upon the title of the plaintiff, as in this case the conveyance to Knowles was void, the Court says, at p. 149, "It is understood to be the practice of the Court not to decree the destruction of instruments as forming a cloud upon title when they are void on the face of them. In the present case reference must necessarily be had to the power of attorney in order to support the deed, and when the power is referred to, it appears that the deed is void. It is true that a memorial registered may be supposed to form a cloud on the title, as a party seeing it might naturally conclude that the attorney had authority to execute the conveyance. No case of this sort has, so far as we know, arisen. But we do not think this should vary the rule. Upon a reasonable examination into the facts of the case, it will appear that the deed registered is a void deed, and therefore forms no cloud upon the title."

The circumstances of the present case are very much stronger in favour of the defendant.

I am therefore of opinion that the demurrer should be overruled.

Judgment for defendant.

The demurrer was subsequently re-heard before the full Court in Hilary term, February 17, 1876.

T. Ferguson for the plaintiff. The question is, whether the plea is one of performance in equity. The plea does not say the two months for the perfecting of the title were not, nor why such time should not be of the essence of the contract. Cragg, the mortgagee, had the legal estate in the land, so far as there was any legal estate transferred by the mortgage to him, under the circumstances. On his death before foreclosure the legal estate passed to his real representative or devisee in trust for his personal representative or legatees,or other persons interested in the personalty. The mere foreclosure of the mortgagor's interest transferred the beneficial interest in the land to the personal representatives of Isaac Cragg, the mortgagee, as so much of his personal estate, which they are at liberty to apportion among themselves, according to the will; and there is no actual beneficial or legal interest which has gone back to or become vested unconditionally in the real representative of the mortgagee, so as to enure to the benefit of the plaintiff, the actual claimant of the land. There has not in fact been made a release or quit claim to the plaintiff of Isabella Knowles's interest in the land, which both parties to the bond expressly treated as a cloud on the plaintiff's title. He referred to *Shaw* v. *Ledyard,* 12 Grant 382; *Truesdell* v. *Cook,* 18 Grant 532; *Ross* v. *Harvey,* 3 Grant 649; *Buchanan* v. *Campbell,* 14 Grant 163; *McGregor* v. *Robertson,* 15 Grant 543.

McMichael, Q. C., contra. The defendant does not say the cloud, such as it was, was removed within two months, but that a foreclosure of the mortgage referred to, was made by the agreement of the plaintiff and the obligors of the bond, which it was assented to should be considered as putting and having put an end to Isabella Knowles's title and to the cloud upon the plaintiff's title. It is not necessary that after foreclosure any conveyance should be made by those in whose favour the foreclosure is to the plaintiff.

The plea is a good defence, but in any event the plaintiff is only entitled to nominal damages. He referred to *Boulter* v. *Hamilton*, 15 C. P. 125; *Paget* v. *Ede*, L. R. 18 Eq. 118.

March 17, 1876. HARRISON, C.J.—The condition of the bond is:

1. That Isaac Cragg or Robert Walker, or one of them, shall *within two months* after date procure from the representatives of Isabella Knowles a conveyance of all their right, title, and interest to the plaintiff. Or:

2. In case of the representatives being unable to execute such conveyance by reason of any disability, that Isaac Cragg and Robert Walker, or one of them, would *within the said period of two months* take such proceedings as would remove the said cloud upon the title, &c.

3. *And* within the same period remove all clouds upon and objections to the said title, and in every other respect make and complete a good absolute and clear paper title, &c.

The breaches assigned are that the said Isaac Cragg and Robert Walker did not (nor did either of them) within the period of two months, or *at any time before the commencement of this suit*, procure the conveyance or take proceedings for the removal of the alleged cloud, &c., nor did they or either of them, within the period of two months, or *at any time before the commencement* of this suit, or *ever*, make and complete a good, absolute, and clear paper title, &c.

The plea, while admitting the bond and condition, sets up as a defence in equity the following facts:

1. That the sale by Isaac Cragg to Isabella Knowles was a mistake.

2. That the deed from Cragg to Knowles and the mortgage from Knowles to Cragg were, as regards the land in question, made in pursuance of the mistake and in furtherance of it.

3. That Cragg *before* the making of the conveyance to Knowles, and before the mortgage from Knowles, had transferred to Walker all his right in the land.

4. That the plaintiff acquired the land from Walker "upon the understanding and agreement that proceedings should be taken to foreclose the mortgage, default having been made in payment of the mortgage money," and that this was to be done "in order that Cragg might execute a a quit claim to the plaintiff."

5. That in accordance with the last mentioned understanding or agreement Cragg took proceedings (not saying when) to foreclose the mortgage.

6. That Cragg died (not saying when), whereby the foreclosure proceedings were suspended.

7. That the foreclosure suit was revived (not saying when), in the name of the defendant as executor of the will of Cragg.

8. That the proceedings were afterwards conducted to a final decree of foreclosure without delay.

9. That there was no delay in the proceedings, except what was unavoidable by reason of the death of Cragg.

And upon this statement of facts the plea proceeds to aver readiness and willingness to release and quit claim to the plaintiff the interest of Knowles, and concludes with the assertion that there never was any cloud on the title.

If the question were merely whether the deed to Isabella Knowles, inoperative as it is shewn to be, and unregistered so far as we can judge from the absence of any allegation on the point in the pleadings, is a cloud on the title, I should agree with Mr. Justice Galt in holding that there never was a cloud on the title: *Hurd* v. *Billinton*, 6 Grant 145; *Buchanan* v. *Campbell*, 14 Grant 163; *McGregor* v. *Robertson*, 15 Grant 543; *Truesdell* v. *Cook*, 18 Grant 532.

But the question is not whether there was a cloud on the title; for cloud or no cloud, there was a something, against which the plaintiff necessarily or unnecessarily demanded protection, and for which necessarily or unnecessarily the bond is intended as a provision.

The bond is in the penal sum of $1000. It may be defeated by shewing:

1. A conveyance to the plaintiff within two months from the representatives of Isabella Knowles of all their right, title, and interest.

2. The taking of such proceedings within the like period as would remove the alleged cloud on the title—the latter to be sufficient only in case of the representatives of Isabella Knowles being unable to execute a conveyance.

3. The removal of all clouds upon and objections to the title, &c.

The plea admits that not one of these things was done. So the plea fails as a defence at law. Then does it disclose any facts which afford a defence in equity? It certainly does not shew any fraud, imposition, or other special ground for equitable relief. All that it does shew is an imperfect attempt at performance, and this is not shewn to have been within the time limited by the condition of the bond.

At law the time in such a case as the present would be of the essence of the contract. See *Scott* v. *Reikie*, 15 C. P. 200; *Burns* v. *Boyd*, 19 U. C. R. 547; *Thayer et al.* v. *Street*, 11 C. P. 243. But it is contended that in equity it should be differently regarded.

The equitable doctrine, however, has no application when time is of the essence of the contract by express agreement: *Honeyman* v. *Marryat*, 21 Beav. 14. Or where from other circumstances it is clear that such was the intention of the parties to the agreement: *Sugden*, V. & P., 14th ed., 260; *Lennon* v. *Napper*, 2 Sch. & Lef. 682; *Roberts* v. *Berry*, 16 Beav. 31, S. C. 3 DeG. M. & G. 284; *Parkin* v. *Thorold*, 16 Beav. 59, overruling S. C., 2 Sim. N. S. 1.; *Tilley* v. *Thomas*, L. R. 3 Ch. 61, 67.

In *Hipwell* v. *Knight*, 1 Y. & C. 401, 415, Alderson, B., said: "The first question is, whether time is of the essence of this agreement. After examining with as much attention as I can the various cases brought before me during the argument, it seems to me to be the result of them all that a Court of equity is to be governed by this principle,—it is to examine the contract, not merely as a Court of law does, to ascertain what the parties have in terms expressed in the contract, but what is in truth the real intention of the parties, and to carry that into effect. But in so doing, I should think it prudent, in the first place, to look carefully at what the parties have expressed, because, in general,

they must be taken to express what they intend; and the burden ought, in good reason, to be thrown on those who assert the contrary. * * It seems to me, therefore, that the conclusion at which Sir Edward Sugden, in his valuable treatise on this subject, has arrived, is founded in law and in good sense."

In *Story's* Eq. Jur. sec. 780, it is said: "Perhaps it may be truly said, that in some of the cases, in which, in former times, the strict terms of the contract, as to time, * * were dispensed with, Courts of equity went beyond the true limits, to which every jurisdiction of this sort should be confined, as it amounted to a substitution *pro tanto* of what the parties had not contracted for. But the tendency of the modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity, and by a reasonable regard to the convenience of mankind, as well as to the common accidents, mistakes, infirmities, and inequalities belonging to all human transactions."

It is now in England by the Judicature Act, 1873, 36 & 37 Vic. ch. 66, sec. 25, sub-sec. 7, provided that "Stipulations in contracts, as to time or otherwise, which before the passing of this Act have * * become of the essence of such contracts in a Court of equity shall receive in all Courts the same construction and effect as they would have hereto-received in equity."

It would seem to me on the reading of this bond that the parties intended time to be the essence of the contract, that is to say, that the plaintiff was not satisfied to wait an indefinite time for the release, for the foreclosure proceedings, or for a good title. He was at the time becoming the owner of land. That land, no doubt, he desired so to possess that he might whenever he saw fit dispose of it by sale or otherwise. But there was a something which he supposed was a cloud on the title, and which whether a cloud or not he thought would interfere with the free disposal of the land. He insisted not only on having it removed, but removed within a reasonable time, and for the purpose of

avoiding all difficulty as to what, under the circumstances, should be deemed a reasonable time the parties fixed two months as the reasonable time. And it seems to me, in the absence of mistake, fraud, accident, or other special ground on which Courts of equity usually relieve parties from their contracts, that the intention of the parties here should be allowed to prevail.

But assuming (without deciding) this point against the plaintiff, the question remains whether the plea shews that *at any time* the condition of the bond has been substantially performed. It shews that at some time (not saying when) proceedings were taken to foreclose the interest of Isabella Knowles in all the lands mentioned in the mortgage, that the proceedings have resulted in a final decree of foreclosure; but the plea nowhere avers that the representatives of Isabella Knowles were unable to execute a conveyance, so as to justify the proceedings in Chancery, nor does it aver that since the proceedings have terminated the defendant or any body having power to convey has executed a conveyance to the plaintiff. Mere readiness and willingness is not in such a case a discharge of the bond: *Mouck* v. *Stuart*, 4 U. C. R. 203; *Ainslie* v. *Chapman*, 5 U. C. R. 313; *Prindle* v. *McCan*, 4 U. C. R. 228; *Osborne et al.* v. *The Berlin and Preston R. W. Co.* 9 C. P. 241.

But there is a vague notion that wherever there is a penalty equity will, on some ground or other, relieve against it.

At law (and in general the same is equally true in equity) if a man undertakes to do a thing, either by way of contract or condition, and it is practicable to do the thing, he is bound to perform it, or he must suffer the ordinary consequences—that is to say, if it be a matter of contract he will be liable at law for damages for the non-performance if it be a condition, then his rights, depending on the performance of the condition, will be gone by the non-performance: *Story's* Eq. Jur., sec. 1302.

In the view of the common law a condition is considered as impossible only when it cannot by any human means take effect: sec. 1305.

If the condition is in the disjunctive, and gives liberty to do one thing or another at the election of the obligor, and both are possible at the time, but one part afterwards, by the act of God or of the obligee, becomes impossible, the obligation is saved. But if one part only was possible at the time, then the other part, if possible, ought to be performed: sec. 1307.

From what has already been said, it is obvious that if a condition or covenant was possible to be performed, there was an obligation on the party at the common law to perform it punctiliously. If he failed to do so, it was wholly immaterial whether the failure was by accident or mistake, or fraud or negligence. In either case his responsibility dependent upon it became absolute, and his rights dependent upon it became forfeited or extinguished: sec. 1311.

Courts of equity do not hold themselves bound by such rigid rules, but they are accustomed to administer as well as to refuse relief in many cases of this sort upon principles peculiar to themselves; some times refusing relief and following out the strict doctrines of the common law as to the effect of conditions or conditional contracts, and sometimes granting relief upon doctrines wholly at variance with those held at the common law: sec. 1312.

In the first place, as to relief in cases of penalties annexed to bonds or other instruments, the design of which is to secure the due fulfilment of the principal obligation, the origin of equity jurisdiction in cases of this sort is certainly obscure, and not easily traced to any very exact source. It is highly probable that relief was first granted upon the ground of accident, or mistake, or fraud, and was limited to cases where the breach of the condition was by the non-payment of money at the specified time. In such cases, Courts of equity seem to have acted upon the ground that by compelling the obligor to pay interest during the time of his default, the obligee would be placed in the same situation as if the principal had been paid at the proper day. They wholly overlooked (as has been said) the consideration that the failure of payment at that day might

be attended with mischievous consequences to the obligee (which in a rational sense never could be cured by any subsequent payment thereof, or with the additional interest.) Upon this ground, doubts have sometimes been expressed as to the solidity of the foundation on which the doctrine affording relief in such cases rests: sec. 1313.

But, whatever may be the origin of the doctrine, it has been for a great length of time established, and is now expanded so as to embrace a variety of cases, not only where money is to be paid but where other things are to be done and other objects are contracted for. In short the general principle now adopted is, that whenever a penalty is merely inserted to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the non-performance: sec. 1314.

Where there is a stipulation that if, on a certain day, an agreement remains wholly or in part unperformed, in which case the real damage may be either very large or very trifling, there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty: per Sir G. Mellish in *Re Dagenham (Thames) Dock Co., Ex parte Hulse*, L. R. 8 Ch. 1025.

In every such case the true test (generally if not universally) by which to ascertain whether the relief can or cannot be had in equity is, to consider whether compensation can be made or not. If it cannot be made, then Courts of equity will not interfere. If it can be made, then if the penalty is to secure the mere payment of money Courts of equity will relieve the party upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then Courts of equity will retain the bill, and will direct an issue of *quantum damnificatus*, and when the amount of damages is ascertained by a jury upon the trial of such an issue, they will grant relief upon the payment of such damages: *Story's* Eq. Jur., sec. 1,314.

In this respect where the penalty (even though called liquidated damages) is merely to secure the performance of collateral acts of small or varying degrees of importance there is at present no substantial difference between Courts of law and Courts of equity: See *Greer et ux.* v. *Johnston*, 32 U. C. R. 77. See also *Kemble* v. *Farren*, 6 Bing. 141; *Betts* v. *Burch*, 4 H. & N. 506; *Parfitt* v. *Chambre*, L. R. 15 Eq. 36; *Lea* v. *Whittaker*, L. R. 8 C. P. 70; *Magee* v. *Lavell*, L. R. 9 C. P. 107; *Archbold* v. *Wilson*, 32 U. C. R. 590; *Hamilton et al.* v. *Moore*, 33 U. C. R. 520; *Sleeman* v. *Waterous*, 23 C. P. 195.

The plea in this case, in its present shape, does not afford either a good legal or a good equitable answer to the declaration. The plaintiff is therefore entitled as against the plea to judgment. But it does not follow that the plaintiff is entitled to enforce payment of the penalty.

I apprehend this bond, like the bond in *Greer et ux* v. *Johnston*, 32 U. C. R. 77, is within the statute 3 & 9 Wm. III. ch. 11, and that the plaintiff in the event of recovery must assess his damages, and restrain the execution to the damage actually assessed: *Anslie* v. *Chapman*, 5 U. C. R. 313; *Boulter* v. *Hamilton*, 15 C. P. 125.

The decision of Mr. Justice Galt must be reversed, and there be judgment for the plaintiff on demurrer to the plea (*a*).

WILSON, J.—The facts are: Isaac Cragg conveyed the land in fee to Robert Walker, who registered the conveyance.

After such conveyance and registration, that is, on or about the 14th of March, 1872, Isaac Cragg by mistake sold and conveyed the same land, with other lands, to Isabella Knowles in fee.

Isabella Knowles, in order to secure the payment of the purchase money of the land in question, and of the other lands, conveyed by mortgage in fee all the said lands so conveyed to her to Isaac Cragg in fee.

It is not said whether the deed to, or the mortgage from Isabella Knowles was registered or not.

(*a*) See *Matthews* v. *Walker*, 26 C. P. 67.

Isabella Knowles then died. Whether she was married or unmarried, or died testate or intestate, we do not know.

The plaintiff then agreed with Robert Walker for the purchase of the land in question in fee, free from all incumbrances, as the declaration says.

The plea alleges that Robert Walker conveyed the land to the plaintiff.

Robert Walker and Isaac Cragg then, by the bond sued on, dated the 1st of September, 1873, bound themselves to the plaintiff that within two months after that date they would procure from the representatives of Isabella Knowles a conveyance of all their right to the lands to the plaintiff.

Or in case such representatives were unable to execute such conveyance by reason of any disability, that the obligors would, within two months, take such proceedings as would remove "the said cloud upon the said title"—that is, the conveyance to Isabella Knowles—and would within the said two months remove all clouds upon and objections to the said title, and in every other respect make and complete a good, absolute and clear paper title to the said land, free from all incumbrances.

It does not appear that the terms of the bond were observed or performed.

But the defendant says that when the plaintiff bought the land from Walker it was agreed between them "that proceedings should be taken to foreclose the said mortgage, default having been made in payment of the mortgage money, and thereby revest the said land so by mistake conveyed to Isabella Knowles, in Isaac Cragg, in order that he might execute a quit claim to the plaintiff."

And that in accordance with such agreement, Cragg took proceedings to foreclose the mortgage without delay. It is not said, however, that such proceedings were taken within the two months from the date of the bond; nor that the representatives of Isabella Knowles were unable to execute a conveyance of all their right and title "to the plaintiff" by reason of any disability.

Then it is said that before the mortgage was finally foreclosed Isaac Cragg died, whereby the foreclosure proceedings were suspended until the suit was revived in the name of the defendant as executor, and the proceedings were then conducted to a final decree of foreclosure without delay; that no delay has occurred in the foreclosure proceedings, except what was unavoidable by the death of Isaac Cragg: and that the defendant is ready and willing to release and quit claim to the plaintiff all the estate, right, title, and interest of Isabella Knowles in the land.

From the pleadings it is plain the parties to the bond treated the conveyance made to Isabella Knowles, although it was made after the deed to Robert Walker and its registration, as a cloud upon the title, and that they expressly engaged to remove it, and to "procure from the representatives of the said Isabella Knowles a conveyance of all their right, &c., in and to the said land to the plaintiff," or, as the plea says, it was agreed Cragg should foreclose the mortgage "in order that he might execute a quit claim to the plaintiff."

It is also plain that, although the mortgage has been foreclosed, no conveyance or quit claim of the title of the representatives of Isabella Knowles, nor of the right or title of Isaac Cragg, has been made to the plaintiff, as it was expressly agreed by the bond, and as it was also expressly agreed by the arrangement set up in the plea, should have been made.

It is not sufficient, in my opinion, that the defendant should have been ready and willing to do so. He should have shewn he had made and executed a conveyance or quit claim to the plaintiff, or that he had tendered and offered it to the plaintiff; and that is especially so when one has bound himself by bond to do so: *Mouck* v. *Stuart*, 4 U. C. R. 203; *Prindle* v. *McCan*, 4 U. C. R. 228.

In this case too there was only the conveyance of a particular right to be made, the right of Isabella Knowles's representatives, or the right of Isaac Cragg after he had got rid of her title. There was no abstract required, nor

did the plaintiff require to consider what conveyances he would require, to make out a good title, as is the ordinary state of things between the vendor and vendee. There was nothing more to be done than to transfer to the plaintiff, by way of extinguishment, the interest or claim said to have formed a cloud upon the title; and the obligors who had undertaken to do that were, and more particularly Cragg, who had himself created it, was bound to do it at their or his own expense. The rule cannot in such a case apply, that the vendee is to prepare the deed at his own expense.

I think the plea is bad, because neither by the terms of the bond, nor of the agreement stated in the plea, has the defendant acquitted himself of his testator's liability to convey the right of Isabella Knowles's representatives in the land to the plaintiff, or to execute a quit claim of Isaac Cragg in the land to the plaintiff after the interest of the said Isabella Knowles in the land was re-vested in him. The defendant is bound to convey or quit claim to the plaintiff as aforesaid, and his mere readiness and willingness is not a sufficient performance of his duty and responsibility.

It is not disputed that the personal representative is entitled to the beneficial interest in a mortgage in fee, the money on which was payable to his testator as mortgagee—that is, if the mortgagee die while it is a mortgage, that is before foreclosure. or before he acquires the equity of redemption, and that is the case here.

The alleged equity of redemption of Isabella Knowles in and to the land under the mortgage she gave has been extinguished by the foreclosure. The effect of that at law is, that the estate of the real representative of Isaac Cragg, assuming the estate to have been a valid interest, is now vested in him absolutely freed from the condition or equity of redemption, and that he is a trustee in equity for the executor of Isaac Cragg as representing the personal estate to which the beneficial interest in the mortgage belongs.

It is evident therefore that a conveyance by the executor will not transfer more than the equitable interest he has, and that it is necessary in strictness that the real represen-

tative, the heir or devisee, whoever he may be, should concur in the conveyance to the plaintiff, for a good title means a good legal and equitable title: *Jeakes* v. *White*, 6 Ex. 873; *Simmons* v. *Heseltine*, 5 C. B. N. S. 554.

It is very plain also that the title or interest was not merely to be extinguished by foreclosure, or by reconveyance to Isaac Cragg. It was to be conveyed to the plaintiff. A reconveyance to Isaac Cragg, or a foreclosure, would have left the title of the mortgagor and purchaser, Isabella Knowles, such as it was, outstanding in another than the plaintiff, and that certainly was not what he bargained for.

The substantial estate and interest in this land is in the mortgagee, or his heirs and assigns, assuming the estate to have originally passed by it: *Paget* v. *Ede*, L. R. 18 Eq. 118.

In that case Bacon, V. C., said, the legal estate was in the mortgagee, and that the equity of redemption is an estate "by figure of speech only," which certainly shews that whatever conveyance has to be made to the plaintiff must be made by some one else as well as the defendant.

I cannot help seeing or saying that this seems to be an action brought for a very fanciful wrong. The plaintiff has not in fact been injured by a later conveyance, such as the one to Isabella Knowles, made after the one to Robert Walker was duly made and registered. No doubt the conveyance to Isabella Knowles is some slight inconvenience, and if it were also registered it may also be an annoyance, and perhaps some slight injury, but it can scarcely be a substantial damage or wrong so long as the plaintiff can get in that latter title.

And if the defendant, as executor, assign over all his interest in it, reciting the facts shortly which conduce to it, the plaintiff may feel as morally free from disturbance from any one as if he had made to him the most formal conveyance from Isaac Cragg or his real representative.

It does not seem that Chancery would remove such a deed as a cloud on the title, even if it were registered: *Buchanan* v. *Campbell*, 14 Grant 163; *Shaw* v. *Ledyard*, 12 Grant 382.

The question must be one of damages only, and it is very probable that amount must be a nominal sum.

Mr. Justice Galt treated the deed to Mrs. Knowles as not a cloud upon the title, but that is to make a contract for the parties who did treat it as a cloud by an instrument under seal as such, and who specially bargained for its removal in the manner pointed out in their agreement; and as they have expressly engaged for the removal of such conveyance, the party must perform his contract or be answerable for not doing it. It is not competent for him to say the instrument is not a cloud upon the title, nor that he is not bound to remove it after having expressly contracted he will do so.

In my opinion there must be judgment on demurrer for the plaintiff.

MORRISON, J., concurred.

Judgment for the plaintiff.

DARBY v. THE CORPORATION OF THE TOWNSHIP OF CROWLAND.

Surface water—Rights of drainage—Liability of municipal corporation.

There had for many years been a culvert across a highway adjoining the plaintiff's land through which the surface water from his land had been accustomed to pass, but the path-master closed it up and made the road-bed solid, by which the flow of surface water from the plaintiff's land was impeded, and the land remained longer wet than it would otherwise have been. The corporation by resolution approved of the path-master's action.

Held, that the plaintiff had no cause of action, for there was no right of drainage across the highway for the surface water, and the corporation could not be liable for not exercising their discretionary powers with regard to drainage of lands.

ACTION for damages for penning back water on plaintiff's land.

The declaration alleged that the plaintiff was possessed of the south half of lot 15, in the 2nd concession of

the township of Crowland, as tenant for the term of his natural life, and was and still is of right entitled that the waters from time to time collecting and being in and upon the said lands, should run and be drained and carried off from his said land, unto and into and through a certain drain or natural water-course on the highway in the said township, through other drains or places, unto and into a certain river, called the Welland river; yet the defendants, in whom the said road is vested, wrongfully put, placed, and threw divers quantities of earth, stone, timber, and rubbish, in and across the said drain or water-course, and lower in the said drain than the land of the plaintiff, and there kept the same for a long space of time, whereby large quantities of the water, which from time to time during that time collected upon the land of the plaintiff, were prevented from running and being drained and carried off from the plaintiff's land, and were penned in or driven back upon, and flowed and ran into and upon the land of the plaintiff.

Plea: not guilty by statute; 36 Vic., ch. 48, secs. 246, 247, 405, 406, 409, and 425.

Issue.

The cause was tried at the last fall assizes, at Welland, before Burton, J., and a jury.

It appeared that in 1874, one Everingham was the path-master for the township: that he owned the lot of land across the road from the plaintiff's: that the fall of surface water was from the plaintiff's land across the road and across Everingham's lot to the river Welland: that for many years there had been a culvert through the road bed for the passage of the surface water: that Everingham, when doing statute labour on the road in 1874, closed up the culvert and made the road bed solid: that the plaintiff opened the culvert, but that Everingham again closed it: that the plaintiff thereupon made complaint to the council of the township, but that the council passed a resolution declining to interfere: that the consequence of the culvert being closed, was to prevent the flow of the surface water from and off the plaintiff's land as freely as it otherwise

would have gone, and that the plaintiff's land remained longer wet than otherwise it would be.

The resolution, which was passed on the 30th December, 1874, was as follows: Mr. Springer moved, seconded by Mr. Dell, "That this council having viewed the water-course adjacent to lot 15, in the second concession, deem that to be the proper channel through which to convey the water; and that the action taken by the path-master, James Everingham, in respect to the same, was in conformity to his duty."

No question was made as to the form or sufficiency of the pleadings.

The learned Judge was of opinion that the plaintiff had not made any case against the defendants; and that the plaintiff should be nonsuited; but upon request of the counsel for the plaintiff, and with the assent of the counsel for the defendants, reserved leave to enter a verdict for the plaintiff for $5, in case the Court should be of opinion that on the evidence the plaintiff was entitled to recover.

The learned Judge was inclined to think that there was not any cause of action proved, but assuming there was a cause of action, he did not think the evidence connected defendants with it; and that the subsequent assent of the defendants to an act not for their benefit, did not make them wrong-doers by relation.

The plaintiff accordingly was nonsuited.

During Michaelmas Term, November, 17, 1875, *James A. Miller* obtained rule calling on the defendants to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff for $5 damages, pursuant to leave reserved at the trial, and why the verdict should not be so entered upon the grounds:

1. That the existence of a water-course is admitted upon the record.

2. That the evidence shews and establishes that James Everingham, the path-master and officer of the defendants, as such, obstructed the said water-course, and that the defendants afterwards ratified his action.

3. That defendants, upon the record, admitted plaintiff's right of action, and that they had obstructed the said water-course, and the plaintiff was, upon the record, entitled to a verdict.

During this term, February 19, 1876, *F. Osler* shewed cause. The plaintiff has not proved any cause of action: *McGillivray* v. *Millin*, 27 U.C.R. 62. If any cause of action is shewn the defendants are not sufficiently connected with it: *Armory* v. *Delamirie*, 1 Sm. L. C., 7th ed., 357, 364. Leave to add a plea traversing the water-course should, if necessary, be allowed: 36 Vic. ch. 8, secs. 49, 50, O.

C. Robinson, Q. C., contra. The defendants, a municipal corporation, are not entitled to plead not guilty by statute: *Hodgins* v. *Corporation of the United Counties of Huron and Bruce*, 3 E. & A. 169. It is, of course, in the discretion of the Court to permit a plea traversing the alleged water-course. But supposing the plea to be added, the evidence shewed the existence of a natural water-course. If there was no water-course, still there was negligence on the part of the defendants: *Farrell* v. *The Mayor of the Town of London*, 12 U. C. R. 343; *Reeves* v. *The Corporation of the City of Toronto*, 21 U. C. R. 157; *Stonehouse* v. *Corporation of the Township of Enniskillen*, 32 U. C. R. 562.

It was, during the argument, agreed between the counsel that the Court should deal with the case in all respects as if all necessary amendments were made.

March 17, 1876. HARRISON, C. J. The plaintiff, as the owner of a parcel of land in the township of Crowland, claims the right "that the waters from time to time collecting and being in and upon the said land," should run and be drained off, in and through a drain across the highway, into the Welland river, and complains that the defendants "wrongfully," not saying unlawfully, obstructed the drain.

The defendants have pleaded not guilty by statute, no doubt intending by such plea to put the plaintiff to the

proof of all the traversable allegations contained in his declaration.

If any objection had been made at the trial on the authority of *Hodgins* v. *The Corporation of the United Counties of Huron & Bruce*, 3 E. & A. 169, that defendants should have pleaded specially, the learned Judge at the trial without doubt would have permitted the pleadings to be amended at the instance of the defendants.

So if the contention had been on the part of the plaintiff that, water-course or no water-course, there was actionable negligence on the part of the defendants, and there appeared evidence thereof, I assume the learned Judge would also have permitted an amendment at the instance of the plaintiff.

All the evidence was received without objection of any kind on either side, and the counsel at the argument of the rule, under the circumstances, very properly agreed that all necessary amendments should be considered as made, and that the Court should deal with the case free from technical objections of any kind. See *Howeren* v. *Bradburn*, 22 Grant 96.

I think that the declaration as framed does not disclose any cause of action, and if amended so as to charge negligence, I fail to find any evidence to sustain the amendment.

Where that which is laid as the cause of action in the declaration is proved at the trial, the plaintiff cannot be nonsuited upon the ground that the facts do not disclose a cause of action: *Lumby* v. *Allday*, 1 C. & J. 301; *Commercial Bank* v. *Harris*, 27 U. C. R. 526.

But as the nonsuit proceeded mainly on the ground that assuming a cause of action the defendants were not sufficiently shewn to be connected with it, in the latter view, if correct, the nonsuit would clearly be proper.

So, if the obstruction, assuming it to have been done by defendants, was not wrongful, *i. e.*, not unlawful, in this view also possibly the nonsuit would be proper.

I propose, however, unembarrassed either by the form of the pleadings, or the form of the rule, to consider and determine "the real question in controversy" between the parties.

What the plaintiff really claims is a right of drainage in, through, or across the highway in the direction of the Welland River. What he complains of is, that this "right" has been obstructed by the defendants.

The question is, whether on the evidence there is any such right shewn.

A right of drainage does not exist *juré naturæ*. The principles applicable to running water which are *publici juris* do not extend to the flow of mere surface water.

This has been expressly so decided in this Province in *McGillivray* v. *Millin*, 27 U. C. R. 62; *Crewson* v. *Grand Trunk R. W. Co.*, Ib. 68; *Murray* v. *Dawson*, 19 C. P. 314;

It is the law of England: *Rawstron* v. *Taylor*, 11 Ex. 369; *Shelton* v. *London & North Western R. W. Co.*, L. R. 2 C. P. 631.

It is also the law of the United States: *Ashley* v. *Wolcott*, 11 Cush. 192, 195; *Flagg* v. *City of Worcester*, 13 Gray 601, 606; *Parks* v. *City of Newburyport*, 10 Gray 28, 29; *Bassett* v. *Salisbury Manufacturing Co.*, 43 N. H. 569, 573; *Goodale* v. *Tuttle*, 29 N. Y. 459; *Buffun* v. *Harris* 5 Rh. I. 243, 253.

It has been held in the United States that the passage of water from rain and melting snow over the surface of land for 20 years gives no right to its continuance: *Parks* v. *City of Newburyport*, 10 Gray 28; *White* v. *Chapin*, 12 Allen 516, 518.

The plaintiff therefore fails on the real question in controversy on the evidence in this case.

The fact that the defendants are a municipal corporation cannot give to the plaintiff any greater rights than he would have against a private individual. It is true, that municipal corporations have power under certain circumstances to pass by-laws for the drainage of lands: sec. 447 of the Municipal Act. But this, like many other powers conferred on municipal bodies, is a discretionary, not an obligatory power: See *In re Trustees of Weston Grammar School et al.*, 13 C. P. 423; *Bell* v. *Crane*, L. R. 8 Q. B., 481; *Hovey* v. *Mayo*, 43 Maine 322: *Benjamin* v. *Wheeler*,

8 Gray 409, 413. They have, in like manner, power by by-law to appoint fire engineers, and fire wardens: sec. 384 of the Municipal Act. But the mere omission to exercise the power does not render the corporation liable for loss of property by fire: *Hafford* v. *City of New Bedford*, 16 Gray 297; *Eastman* v. *Meredith*, 36 N. H. 284; *Bigelow* v. *Inhabitants of Randolph*, 14 Gray 541; *Oliver* v. *City of Worcester*, 102 Mass. 489. Where the power conferred is a legislative or discretionary power it is one which the corporations may in their wisdom exercise or not, and when they abstain from its exercise no action lies against them for not exercising it: *Wheeler* v. *City of Cincinnati*, 2 Am. 368; *Grant* v. *City of Erie*, 8 Am. 272: *Jewett* v. *New Haven*, 9 Am. 382; *Torbush* v. *City of Norwich*, *Ib.* 395; *Heller* v. *Sedalia*, 14 Am. 444.

The plaintiff would be in a very different position if his cause of action were that defendants by means of ditches, carried to and projected on the plaintiff's land more surface water than otherwise it would have received: *Perdue* v. *Corporation of the Township of Chinguacousy*, 25 U. C. R. 61; *Rowe* v. *The Corporation of the Township of Rochester*, 29 U. C. R. 590: *Stonehouse* v. *The Corporation of the Township of Enniskillen.*, 32 U. C. R. 562; or even negligently did what they had a right to do in closing the culvert for the purpose of repairing the highway and making it reasonably safe and convenient for travel. *Farrell* v. *London*, 12 U. C. R. 343; *Reeves* v. *The Corporation of the City of Toronto*, 21 U. C. R. 157. But no such case as either of those last supposed was presented at the trial or is maintainable on the evidence.

I think, independently of the question whether defendants were sufficiently shewn to be connected with the alleged wrongful act: (see *Nevill* v. *The Corporation of the Township of Ross et al.*, 22 C. P. 487), that the plaintiff was properly nonsuited.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

ASKEW v. MANNING ET AL.

Replevin—Formation of union school sections—Existence of corporations—Mode of testing.

Replevin. Plea justifying under a distress for school rate for a union school section No. 2, Raleigh and Tilbury E, alleged to have been duly formed by the reeves of said townships and the local superintendent, of which section defendants were trustees, and averring that the rate was imposed by defendants to raise the necessary sum to purchase a school site, and that the plaintiff was rated in respect thereof. Replications, 1. That the said section was not formed as alleged. 2. That the alleged union school section was on or about 24th December, 1873, pretended to be formed by the reeves of the said townships and the superintendent by uniting section 6 of Tilbury with parts of sections in Raleigh: that the plaintiff resided and was a ratepayer within one of the sections affected by the proposed formation of said section: that no notice was given to him and others intended to be affected by such formation, or of any alteration in the sections in said townships: that the inspector of the county has not transmitted to the clerks of said townships any copy of the resolution to form said section, nor have the reeves of the said townships, with the inspector or otherwise, equalized the assessment within said section.

Held, on demurrer, replications bad, for that it was not open to the plaintiff in this suit to contest the validity of the formation of the school section on the grounds taken, his proper course being by information in the nature of *quo warranto* to determine the defendants' right to the office of trustee.

The plaintiff replied also that the defendants were not on the 24th of December, 1873, a corporation duly formed as alleged. Upon the trial it appeared that the union section for which the defendants assumed to be trustees had been formed by adding to a section in one township parts of two sections in another township: *Held*, that a union school section can be formed only of two sections, not of parts of sections; and that the objection therefore being not to the regular exercise, but to the existence, of the power to form such sections, and the facts being undisputed the validity of the formation might be questioned in this action.

DEMURRER: Declaration in replevin for three cows, &c.

Second plea, by defendant Manning: That the defendants were, before the time of the alleged taking, to wit, on the 24th December, 1873, a corporation under the name of the Trustees Union School Section No. 2, Raleigh and Tilbury East, duly formed by the reeves of the said respective townships and the local superintendent; and that the plaintiff was liable to be rated for school purposes in the said section: that a rate was imposed by the said trustees to raise the sum necessary to purchase a school site for the said section, and the plaintiff was thereby duly rated for

the sum of $33.32: that a proper warrant was delivered by the said trustees to this defendant Manning, who was duly appointed collector of school rates for the said school section, whereby he was authorized and required to collect from the plaintiff the said sum of $33.32, for which the plaintiff was duly rated, and by the said warrant the said Manning was further authorized and required, in case the plaintiff should make default in payment of the said sum, to levy the same from the plaintiff by distress of his goods and chattels; and thereafter, and whilst this defendant was such collector, he duly demanded the said sum, being the amount of the said rate, from the plaintiff, which he refused to pay, and so made default in payment of the same; therefore this defendant took the same within the limits of the said school section as a distress for goods the said rate, which are the alleged grievances; and the said Manning well acknowledges the taking of the said goods and unjustly detaining the same as a distress for the said rate, which still remains due and unpaid.

Third plea, by the other two defendants, in effect similar to the second plea by Manning, alleging that they and defendant Manning were the trustees of the section, and gave a warrant to Manning to levy the rate.

Fifth replication to the second and third pleas: that the said Union School Section was not formed as alleged.

Sixth replication to the same pleas: that the alleged Union School Section was, on or about the 24th December, 1873, pretended to be formed by the reeves of the said townships of Raleigh and Tilbury and the local superintendent, by uniting section No. 6 of Tilbury with parts of sections in Raleigh: that the plaintiff was a resident within the boundaries of one of the school sections affected by the proposed formation of the said Union School Section, and was a ratepayer within such boundaries: that no notice was given to the plaintiff and other parties intended to be affected by the formation of the Union School Section of the intended formation thereof, or of any alteration in the boundaries of the existing school sections in the said town-

ships or either of them: that the inspector of public schools of the said county of Kent has not transmitted to the respective clerks of the said municipalities of Raleigh and Tilbury East any copy of the resolution for the formation of the alleged Union School Section, nor have the reeves of the said townships, with the inspector or otherwise, equalized the assessment on the rateable property within the said Union School Section.

Demurrer to the fifth and sixth replications: that in an action of this nature the plaintiff cannot contest the validity of the formation of the said Union School Section.

November 22, 1875, the case was argued before Wilson, J., sitting for the full Court.

J. K. Kerr, for the demurrer. The statutes relating to the subject are Consol. Stat. U. C. ch. 64, secs. 40–45; 23 Vic. ch. 49; 34 Vic. ch. 33, O. The acts of the trustees are to be maintained. If the school section be not rightly established it may be remedied by special proceedings. Sec. 16 of the last named Act shews the remedy was by by appeal to the County Court Judge. It does not appear the plaintiff was a resident of the school section at the time of the formation of the Union. He referred to *Re Gill and Jackson*, 14 U. C. R. 119; *Coleman* v. *Kerr*, 27 U. C. R. 5, 10; *Patterson and the Corporation of the Township of Hope*, 30 U. C. R. 484; *Craig* v. *Rankin*, 10 C. P. 186; *Gillies* v. *Wood*, 13 U. C. R. 357; *McGregor* v. *Pratt*, 6 C. P. 173; *Forbes* v. *School Trustees of Plympton*, 8 C. P. 73.

F. Osler, contra. The last objection if it had been relied upon could have been amended in chambers. The plaintiff's liability depends on whether the union section has been duly formed. The 34 Vic. ch. 33 sec. 16, O., does not apply to the union of school sections from parts of different townships: *Re Proper and the Corporation of the Township of Oakland*, 34 U. C. R. 266. The following cases shew that the legality of the formation of the union section may be disputed in an action: *Williams* v. *School Trustees of section* 8 *of Plympton*, 7 C. P. 559; *Harling*

v. *Mayville*, 21 C. P. 499; *Free* v. *McHugh*, 24 C. P. 13, 19; *Coleman* v. *Kerr*, 27 U. C. R. 5; *Haacke* v. *Marr*, 8 C. P. 441; *Re Hart and the Municipality of Vespra and Sunnidale*, 16 U. C. R. 32; *Re Ley and the Municipality of the Township of Clarke*, 13 U. C. R. 433; *Griffiths* v. *The Municipality of Grantham*, 6 C. P. 274; *Malone* v. *Faulkner*, 11 U. C. R. 116.

The want of notice to the clerk is a material defect, because without it no rate can be made or levied. The assessments must first be equalized.

J. K. Kerr, in reply, referred to 23 Vic. ch. 49 secs. 13, 14: *Re Ness and the Municipality of the Township of Saltfleet*, 13 U. C. R. 408.

February 15, 1876. WILSON, J.—It is necessary to see what the legislation on this subject has been, for it is by it the rights of the parties must be determined.

The Consol. Stat. U. C. ch. 64 enacts: Sec. 40: In case it clearly appears that all parties to be affected by a proposed alteration in the boundaries of a school section have been duly notified of the intended step or application, the township council may alter such boundaries, to take effect on the 25th of December next after the alteration has been made.

Section 45, as amended by 23 Vic. ch. 49, sec. 5: Under the conditions prescribed in the 40th section in respect to alterations of other school sections, union school sections consisting of parts of two or more townships or parts of a township * * may be formed and altered by the reeves and local superintendent or superintendents of the townships out of parts of which such sections are proposed to be formed * * at a meeting appointed for that purpose by any two of such reeves * * of which meeting the other parties authorized to act with them shall be duly notified.

34 Vic. ch. 33, sec. 18, declares that on the formation or alteration of a union school section or division under 23 Vic. ch. 49, sec. 5, the county inspector concerned shall forthwith transmit a copy of the resolution by which the formation

or alteration was made, to the clerk of the municipality affected by such resolution.

It shall be competent for the county inspector to call a meeting of the parties authorized to form and alter union school sections, and it shall be the duty of the reeves of the townships out of which the section is formed, with the county inspector, to equalize the assessment.

The plaintiff says the union of school sections which he says was pretended to be formed on the 24th December, 1873, he had no notice of; nor had other parties, all of whom were affected by the intended formation of the union, notice of such intended formation.

And the defendants say that may have been or may be a cause for rescinding the resolution adopted for forming the union and for dissolving the union, but it is no answer to a levy made for a rate which has been imposed under and by virtue of the resolution by the corporation which has been created under it, so long as the corporation is in existence.

The first and main question then is, whether the want of a notice to the plaintiff and the other parties intended to be affected by the formation of the union school section of the intended formation thereof, can be shewn in this action for the purpose of avoiding and invalidating the proceedings taken to effect the union, and of putting an end to the existence of the corporation which was formed.

The 40th sec. of the Consol. Stat. ch. 64, to which the 5th sec. of the 23 Vic. ch. 49 refers, is very plainly worded "In case it clearly appears that all parties to be affected * * have been duly notified of the intended step or application," the reeves and local superintendent of the townships out of parts of which the section is to be formed may, at a meeting appointed for the purpose, by resolution be formed: 34 Vic. ch. 33 sec. 18.

The notice is a condition precedent to be given before the change can be made. If it be not given the action of the parties taken to alter the old sectional boundaries, and to form a new school section must be voidable and remediable.

I do not say the proceedings would be absolutely void because if that were so they could not be confirmed. And I am of opinion that either by subsequent ratification or by acquiescence they could be adopted and become binding. But they were at least voidable for the purpose of enabling any one to apply to have them vacated: *Regina* v. *Thomas*, 8 A. & E. 183; *Rex* v. *Harris*, 1 B. & Ad. 936; *Regina* v. *Grimshaw*, 10 Q. B. 747.

In *Penney* v. *Slade*, 5 Bing N. C. 319, an overseer was appointed by a minority of magistrates present at the meeting—the majority not observing at the time what was being done. When they discovered it they attempted to undo what had been done. The overseer appointed by the minority distrained on a warrant signed by two of the minority as justices of the peace, on the plaintiff for a rate. The plaintiff brought trespass against two of the magistrates and it was left to the jury to say whether the appointment by the minority was fraudulent or not. They found it not fraudulent.

In disposing of the rule *nisi* for a new trial Tindal, C. J., said, at p. 331, "Here is a judicial act performed without fraud, at a meeting which was competent in point of jurisdiction to perform it, and that act verified by a sufficient number of signatures to satisfy the requisitions of the statute which directs the appointment to be made. We think, therefore, that it cannot be questioned in this collateral way on the ground of an irregularity or miscarriage in ascertaining the sentiments of the meeting. We have the less hesitation in coming to this conclusion, because the law has provided appropriate methods of settling such a question * * * It is obviously a much more convenient course that the validity of the appointment should be brought into controversy in a direct way immediately upon the appointment, than that a party should lie by until a rate had been made and levied, and should then be allowed to revert back to some miscarriage in the appointment. No objection arising in such a way ought to prevail, unless it rests on the most solid ground, which in our judgment the present objection does not."

A rate levied by the churchwardens *de facto*, although not duly elected, is valid: *Scadding* v. *Lorant*, 13 Q. B 687, in Ex. Ch. Ib. 706, in H. L. 15 Jur. 955.

The validity of a charter of incorporation was not allowed to be raised on a *certiorari*, to quash a rate which had been levied, on the ground that there had been no petition for incorporation by the whole or by the majority of the inhabitant householders; or that the grant of Quarter Sessions had been made on a representation to the Crown that there was a gaol in Birmingham when in fact there was not one: *Regina* v. *Boucher*, 3 Q. B. 641. See also *The Company of Proprietors of the Monmouthshire Canal Navigation* v. *Kendall*, 4 B. & A. 453; *Re Gill and Jackson*, 14 U. C. R. 119; *Regina* v. *Taylor*, 11 A. & E. 949; *The Attorney General* v. *The Port-reeve, Aldermen, and Burgesses of Avon*, 9 Jur. N. S. 1117.

In *Regina* v. *Jones*, 8 L. T. N. S. 503, the Court refused to grant a *quo warranto* information against an individual to try the legality of a charter of a municipal corporation.

Cockburn, C. J., said: "You are seeking to repeal a charter not in a question directed to the charter, but in a proceeding against an individual." And when *Lloyd* v. *The Queen*, 31 L. J. Q. B. 207 was cited, Cockburn, C. J. said, "There was no pretence for saying that there was any existing corporation."

In *The Attorney-General* v. *The Corporation of Avon*, 33 Beav. 67, it was held that the Court of Chancery will not, in a suit relating to the property of a corporation, determine on the validity of a charter of incorporation.

The cases of *Hart and the Municipality of Vespra and Sunnidale*, 16 U. C. R. 32; *Griffith and Municipality of Grantham*, 6 C. P.274; *Re Ness and the Municipality of the Township of Saltfleet*, 13 U. C. R. 408; *Re Ley and the Municipality of the Township of Clarke*, 13 U. C. R. 433; and *Patterson and the Corporation of the Township of Hope*, 30 U. C. R. 484, do not apply here because they were cases founded on motions to quash the by-laws complained of, and were not therefore in any way pro-

ceedings which affected the formation or existence of a corporation.

The cases of *Haacke* v. *Marr*, 8 C. P. 441; *Coleman* v *Kerr*, 27 U. C. R. 5; *Harling* v. *Mayville*, 21 C. P. 499, and *Free* v. *McHugh*, 24 C. P. 13, were none of them impeaching the validity of the corporation. They each shewed some defect in the making of the by-law.

Williams v. *School Trustees of Section 8, Plympton*, 7 C. P. 559, was an action for levying a rate to pay for expenses attending the wrongful change of the school site; and *Craig* v. *Rankin*, 10 C. P. 186, does not apply.

The plaintiff does not complain that the defendants had power to pass the by-law if they were duly incorporated. He desires to defeat the incorporation of the trustees in a collateral proceeding, which he certainly cannot do.

Then he alleges that the inspector of public schools of the county did not transmit to the respective clerks of the municipalities of Raleigh and Tilbury East any copy of the resolution of the formation of the alleged union school section, under 34 Vic. ch. 33 sec. 18. No doubt that was an omission of the inspector, for it is made expressly his duty to do it.

It is not said for what purpose the notice is required to be given, but very likely in order that the township municipal authorities may have formal notice of the change made, in order that the township councils may respectively undo such change if they please, and that the clerks may be able to give the necessary information to the local superintendent, and that they may also prepare the maps of the townships respectively, shewing the different school sections, under Consol. Stat. U. C. ch. 64 secs. 47, 48, 49, and 34 Vic. ch. 33, sec. 19. The notice of the resolution does not seem to be required as a condition precedent, or as an essential act, to enable the trustees to levy the rate now in question.

Then the plaintiff says that the reeves of the two townships, with the inspector or otherwise, did not equalize the assessment on the ratable property within the union school section, under the 34 Vic. ch. 33, sec. 18.

That enactment is, "That it shall be competent for any county inspector to call a meeting of the parties authorized to form and alter union school sections, and it shall be lawful for, and the duty of, the reeves of the townships out of which the section is formed with the county inspector, to equalize the assessment."

The plea of the plaintiff does not allege that the county inspector did not call the meeting just mentioned. It merely states the assessment was not equalized. If there was a meeting called, and the proper parties attended, it may be that no equalization was necessary, and that the assessments were permitted to remain as they were as and in place of the best equalization that could have been made.

The whole system of equalization of the assessments of different municipalities for a common or joint purpose is based upon an examination of the rolls of the respective municipalities for the purpose of ascertaining whether the valuation in each municipality bears a just relation to the valuation made in all the municipalities so joined for the common purpose: 32 Vic. ch. 36, sec. 71.

And in the case of counties in which there are towns and villages, there must of necessity be an equalization between the assessments in them and in the townships of the county.

But here it is two townships which compose the union school section, and there may be no equalization required. Whether the objection could be sustained even if it was alleged that an equalization was necessary without the plaintiff alleging that the want of it had made any, and if so what difference in his assessment, I need not enquire. I am disposed to think it could not, for by-laws are not even to be quashed on technical or fanciful grounds, far less to be impeached in this collateral and incidental manner.

I give judgment for the defendants on demurrer.

Judgment for defendants.

February 21, 1876. The case was brought on for rehearing before the full Court.

F. Osler, for plaintiff. *J. K. Kerr*, contra. The arguments and cases cited were in substance those used on the hearing before the single Judge.

March 17, 1876. HARRISON, C. J.—I agree in the decision of the learned Judge who determined this case and in the reasons which he gives for his decision.

The replications admit that the defendants, before and at the time of the alleged taking of the plaintiff's goods, were trustees *de facto* of the Union School section No. 2, Raleigh and Tilbury East: that the rate was imposed by the said trustees to raise the sum necessary to purchase a school site for the union school section, and that the plaintiff was rated in respect thereof.

It is not shewn by the replications that any proceedings have ever been had or taken for the purpose of testing the validity of the formation of the union school section, and I do not think it is open to the plaintiff in the present suit on a mere question of irregularity to raise any such contention.

The reasoning of Tindal, C. J., in *Penney* v. *Slade*, 5 Bing. N. C. 331, is directly opposed to any such course.

The language of Sir J. B. Robinson, C. J., in *Gill* v. *Jackson et al.*, 14 U. C. R. 119, 127, where he says, "The learned Judge left out of view that the trustees who imposed and received the rate were the trustees *de facto*, and that until they are removed the acts which they do in the ordinary current business of trustees must of necessity be upheld, or everything will fall into confusion," is equally opposed to any such course.

A similar rule prevails in the United States.

In the *Trustees of Vernon Society* v. *Hills*, 6 Cowen 23, 27, Savage, C. J., is reported to have said: "The plaintiffs have acted as trustees upon the matter in question, and in bringing their suit *colore officii*, and before an objection to their right can be sustained by the defendant on the ground that they were not regularly elected, he must shew that proceedings have been instituted against them by the Government, and carried on to judgment of ouster." See

further *Williams* v. *The Inhabitants of School District No. 1 in Lunenburg*, 21 Pick. 75; *Cahill et al.* v. *Kalamazoo Mutual Insurance Co.*, 2 Doug. Mich. 124; *Eaton et al.* v. *Harris*, 42 Ala. 491.

In *High's* Extraordinary Legal Remedies, sec. 629, it is assumed as settled law in the United States that, as to officers *de facto*, the Court will not enquire into their title in collateral proceedings.

It is, to use the language of Tindal, C. J., in *Penney* v. *Slade*, 5 Bing. N. C. 331, obviously a much more convenient course that the validity of the formation of the section should be brought into controversy in a direct way, rather than that a party should lie by till a rate has been made, and then attempt to contest it in a suit by or against him in respect of the rate. Besides, if such a course were permitted there would be no certainty or finality in the proceedings. In one suit it might be held that the union was properly constituted; in another, the reverse. And so there might be no end to the trouble and litigation.

Mr. Osler, however, while admitting the soundness of the reasoning on which the foregoing cases proceeded, argued that in this particular case the reasoning is inapplicable. He argued that in the case of school trustees there can be no remedy by *quo warranto*, or otherwise than by suits between parties for the purpose of deciding the controversy.

If his proposition be well founded, his conclusion properly follows.

But I am not satisfied that it is well founded. On the contrary, I believe it is without real foundation.

It is a maxim of corporation law that if a municipal officer is *bonâ fide* in possession of the office his title shall not be tried otherwise than by information in the nature of *quo warranto*: Per Campbell, C. J., in *Regina* v. *The Mayor, &c., of Chester*, 2 Jur. N. S. 114, 116. See further *Regina* v. *Reynolds*, 1 Ir. C. L. R. 158, 161; *Regina* v. *The Town Commissioners of Tuam*, 4 Ir. Jur. N. S. Q. B. 48; *Regina* v. *Finnegan*, 10 Ir. C. L. R. 299; *In re Election of Members of the Board of Police, Brockville*, 3 O.

S. 173; *In re Biggar*, 3 U. C. R. 144; *In re Moore and Port Bruce Harbor Co.*, 14 U. C. R. 365.

While Mr. Osler admitted that in the case of a municipal office, properly so called, the remedy would be by *quo warranto*, he argued that in the case of the office of school trustee the remedy is inapplicable, for that the statute 9 Anne, ch. 20, is inapplicable to such an office.

"The mode of proceeding by information in the nature of *quo warranto* came no doubt in the place of the ancient writ of *quo warranto*. This writ was brought for property of, or franchises derived from the Crown. The earliest is to be found in the 9 Richard, *Abbreviatio Placitorum*, p. 21, and is against the incumbent of a church, calling on him to shew *quo warranto* he holds the church. Then follow many others, in the time of John, Henry II., and Edward I., for lands, for view of frank-pledge, for return of writs, holding of pleas, free warren, plein-age and prisage (*Abbreviatio Brevium*, p. 210; 14 Ed. I.,) emendation of assize of bread and beer, pillory and tumbril, and gallows. Some of these are offices, or in the nature of offices, as in the instance of returns of writs, holding of Courts. The practice of filing informations of this sort by the Attorney-General, in lieu of these writs, is very ancient; and in *Coke's* Entries are many precedents of such informations against persons for usurping the same sort of franchises, as claiming to be a corporation to have waifs, strays, holding a Court leet, Court baron, pillory and tumbril, markets, prison, or for usurping a public office, as conservator of the Thames, and coal and corn meter. It is only in more modern times that informations have been filed by the King's coroner and attorney. The first reported case is that of *Rex* v. *The Mayor &c., of Hertford*, 1 Ld. Raym. 426. And it is a mistake to suppose that these informations were founded on the statute of 9 Anne, ch. 20: *Rex* v. *Gregory*, 4 T. R. 240*n.*; and *Rex* v. *Williams*, 1 Burr. 402, where the right to file an information at common law, by the coroner and attorney, against a person for holding a Criminal Court of Record was recognized. After

the Statute 4 & 5 W. & M. ch. 18, which restrained the filing of informations by the coroner and attorney, the sanction of the Court was required, and after that statute and the 9 Anne, ch. 20, it exercised a discretion to grant or refuse them to private prosecutors according to the nature of the case:" Per Tindal, C. J., in *Darley* v. *The Queen,* 12 Cl. & Fin. 520, 537.

It is also a mistake to suppose that at common law the information in the nature of a *quo warranto* is restricted to offices conferred by the Crown or in which the rights of the Crown are directly concerned.

In 1735, on an information *quo warranto* against defendant for exercising the office of Master of the Coopers' Company, which set forth that the Master was an officer of "public trust," Lord Hardwicke, on demurrer to the information, held the information good, "since the information lays it to be a public office of trust": *Rex* v. *Neal,* Cases Temp. Hard. 106.

In 1795, on an information *quo warranto* against several persons acting as trustees under a private Act of Parliament for enlarging and regulating the port of Whitehaven, it was argued that the Court never grants these informations, but in cases where there is an usurpation on some franchise of the Crown, but it was resolved by the Court, "that the rule was laid down too general, for that informations have been constantly granted where any new jurisdiction or a public trust is exercised without authority": *Rex* v. *Nicholson et al.,* 1 Str. 299.

In some later cases, such as *Rex* v. *Ramsden et al.,* 3 A. & E. 456; *Rex* v. *Beedle et al.,* Ib., 467; and *In re Aston Union,* 6 A. & E. 784, there were contradictory decisions and great differences of opinion among the Judges.

But since *Darley* v. *The Queen,* 12 Cl. & Fin. 520, it must be taken that the law as to *quo warranto* is settled, and settled on a basis quite in accordance with the expanding wants of society and the demands of law considered as a progressive and expansive science.

In that case, Tindal, C. J., who delivered not only his

own opinion but the opinions of the eminent Judges, Patteson, Williams, Coleridge, Coltman, Maule, Wightman, Cresswell, Parke, Alderson, and Platt, said, at p. 541, "After the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of *quo warranto* will lie for usurping any office whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of *a public nature*, and a substantive office, not merely the function or employment of a deputy or servant held at the will or pleasure of others."

In the same case Lord Brougham, in affirming the opinions of the Judges, said: "I do not think it necessary now-a-days to shew, that because a *quo warranto* was formerly only held to lie where there was an usurpation of a franchise or of a matter proceeding from the prerogative of the Crown, therefore an information in the nature of a *quo warranto*, which, generally speaking, follows the same rule, is to be confined within the same strict rules. I think if you take the whole weight of the authorities, the balance is much in favour of the extension which this appears to be beyond that limit."

In *Regina* v. *The Guardians of the Poor of St. Martin's in the Fields*, 17 Q. B. 149, 163, Mr. Justice, afterwards Chief Justice, Erle, said: "Three tests of the applicability of a *quo warranto* are given by *Darley* v. *The Queen* 12 Cl. Fin. 520, the *source of the office*, the *tenure*, and *the duties*. The source here is a statute; the tenure, secure enough to satisfy the rule: as to the duties, no definition of public duties has been given. All we can do is, to follow such guidance as we have from the last cited case. If the execution of an office secures the proper distribution of a fund, in which a body of the public (the contributors to a parish rate) have an interest, the office may be deemed public."

In *Hill and The Queen*, 8 Moo. P. C. 138, where the office was that of surgeon of the district prison of St. Catharine, in the island of Jamaica, (created by acts of the Local Legislature), it was intimated that a *quo warranto* was the proper remedy to try the right of office.

In *Regina* v. *The Bank of Upper Canada*, 5 U. C. R., 335, it was doubted if a trading corporation, such as a bank, would be the proper object of a proceeding by *quo warranto*.

In *Regina* v. *Hespeler et al.*, 11 U. C. R. 222, it was held that the office of director in a railway company was not an office for which an information in the nature of *quo warranto* would lie.

In *Regina* v. *Acason*, 2 B. & S. 795, the right of the defendant to the office of superintendent registrar, under stat. 7 Wm. IV., and 1 Vic. ch. 22, was tried by *quo warranto* without objection.

In *Regina* v. *Hampton et al.*, 6 B. & S. 923, it was held, applying the tests given in *Darley* v. *Regina*, that *quo warranto* lies for the office of guardian of the poor, elected under 4 & 5 Wm. IV. ch. 76, sec. 28; but in a subsequent case the Court refused to grant a *quo warranto* to enquire into the election of an assistant overseer: *Regina* v. *Simpson*, 19 W. R. 73, Q. B.

In *Bradley* v. *Sylvester*, 25 L. T. N. S. 459, the Court of Queen's Bench, on an application for a *quo warranto* against the clerk of the school board, refused the rule, considering that the majority of the board might, without assistance, remedy the impropriety, if any, and that the office was one during the pleasure of the board.

In *Regina* v. *The Poor Law Commissioners*, 3 Ir. C. L. R. 147, it was decided that *quo warranto* does not lie in any case for an office held during pleasure; and in *Rex* v. *Cousins*, 28 L. T. N. S. 116, it was held that before the Court will grant the information, it must be satisfied that there is a substantial grievance.

In *Ex parte Smith*, 8 L. T. N. S. 458, leave was refused in the case of a committeeman of the Licensed Victuallers Association, the Court saying, "Here the office is one in a society of a purely eleemosynary kind."

If the tests suggested in *Darley* v. *The Queen*, and applied in *Regina* v. *The Guardians of the Poor of St. Martin the Fields*, 17 Q. B. 149, and following cases, be applied to

the office of school trustee as known in this Province, it will be found to stand the tests. The source here is a statute, the tenure is secure enough to satisfy the rule, and the duties are of a *public*, not of a mere private or eleemosynary character.

There is no instance of any information in the nature of a *quo warranto* being brought against a corporation *as a corporation* for a usurpation upon the Crown, but by and in the name of the Attorney-General on behalf of the Crown: *Rex* v. *Corporation of Carmathen*, 2 Burr. 869. If any number of individuals claim to be a corporation, without any right so to be, that is an usurpation of a franchise, and an information against the whole corporation as a body, to shew by what authority they claim to be a corporation, can be brought only by and in the name of the Attorney-General: *Rex v. Ogden et al.*, 10 B. & C. 230; *Regina* v. *Taylor*, 11 A. & E. 949. But the Court will grant a *quo warranto* at the instance of a private relator against a member of an alleged corporation on grounds affecting his individual title, although it be suggested that the same objections apply to every member, and, therefore, that the application is in effect against the whole corporate body: *Rex* v. *White*, 5 A. & E. 613. It cannot be stated as a proposition of law or as a settled practice of the Court, that leave to file an information will not be granted *merely* because the effect may or even will be to dissolve the corporation: *Rex* v. *Parry*, 6 A. & E. 810, 820. See also *Regina ex rel. Lawrence* v. *Woodruff*, 1 C. L. Cham. R. 119.

Whenever the information comes from the Attorney-General on the part of the Crown, no leave of the Court is required; but when filed on behalf of some individual, the master of the Crown office is the proper person to represent the Crown. The statute 4 & 5 W. & M. ch. 18, was passed to restrict the last mentioned informations being filed without the leave of the Court first obtained for the purpose. The statute 9 Anne ch. 20, rendered the proceeding more easy in respect of annual elections to corporate offices: *Regina ex rel. Hart* v. *Lindsay*, 18 U. C. R. 51.

Upon the whole, I feel no doubt that an information in the nature of *quo warranto* will lie in the case of school trustees in this Province: that it may either be filed by the Attorney-General against the corporation, or by a relator, with the leave of the Court, against all or any of the individual trustees; and that this is the direct and appropriate remedy for settling a controversy such as presented by the pleadings now before us in this case.

In my opinion, the decision appealed against must be affirmed with costs.

MORRISON, J., and WILSON, J., concurred.

Judgment accordingly.

The cause was subsequently taken to trial, and the issues in fact were tried at the last Spring Assizes for the county of Kent, before Morrison, J., without a jury.

The defendants, besides the second and third pleas involved in the demurrer, which are set out ante p. 345, 346, pleaded:

1. That they did not take the said goods or any of them as alleged.

4. That the grievances were committed by defendants after the passing of the Consol. Stat. U. C. ch. 64, and the 23 Vic. ch. 49, and under and in pursuance of the duties imposed upon defendants by said statutes, and that no notice of action had been given to them.

5. Not guilty.

The plaintiff, in addition to the fifth and sixth replications demurred to, which will be found on pp. 346, 7, took issue on all the pleas, and replied:

2. To the second and third pleas: that the defendants were not, on the said 24th December, 1873, a corporation duly formed in manner and form as alleged.

3. To the same pleas: that the plaintiff was not liable to be rated for school purposes in the said school section as alleged.

4. To the same pleas: that the said rate was not imposed by the said trustees as alleged.

The defendants joined issue on all the replications, besides demurring to the fifth and sixth.

It appeared that the school section No. 2 of Raleigh and Tilbury East, called a Union School Section, was formed on 24th December, 1873. The boundaries were as laid down in the by-law forming the section, of which the following is a copy:—

"A by-law to form a Union School Section for the townships of Raleigh and Tilbury East, (passed this 24th December, 1873.) Whereas it is necessary to form a union school section for the townships of Raleigh and Tilbury East. We, Stephen White, Reeve of Raleigh; Alexander Coulter, Reeve of Tilbury East; and Edmund B. Harrison, Inspector of Public Schools for the county of Kent, do hereby, by virtue of and under the authority of the Public School Act of the Province of Ontario now in force, enact: that the whole of Public School Section number six in the township of Tilbury East, and the south-east half of lot number one in concession number thirteen, lots numbers one and two in concession number fourteen, and lots numbers one hundred and sixty-two, one hundred and sixty-three, and one hundred and sixty-four on the Talbot Road, in the township of Raleigh, be united for the purpose of forming one school section, and be hereafter known as Union School Section No. 2, Raleigh and Tilbury East; and that John McDonald of Tilbury East is hereby authorized to call the first meeting for the election of public school trustees. (Signed),

"Stephen White, Reeve of Raleigh.
"Alexander Coulter, Reeve of Tilbury East.
"Edmund B. Harrison, I. P. S., Kent."

The proceedings at the first meeting for the election of school trustees were quashed by the inspector at the instance of a ratepayer, because the proceedings were brought to an end before the expiration of an hour.

The inspector ordered a second meeting, which was afterwards held, and at which the defendants were elected trustees for the new school section.

The ratepayers afterwards, on 17th March, 1874, at a

special meeting for the purpose of arranging to build a school house, authorized the building of a new school house, and authorized the trustees to raise money in the section for the purpose.

At a meeting held on 13th July, 1874, two of the trustees only being present, the third having been notified and not attending, it was resolved, "that for the purpose of levying the rate to defray the expenses of building the school house, that the total valuation of property in the section was $22,894, and that it will require a rate of five cents in the dollar to raise $1,150, the sum required to defray the expense of building the school house and its belongings." And the secretary was directed to make out the rate for the amount required from each township in proportion to their assessment, and to apply to the respective councils of Tilbury East and Raleigh for the loan.

On 31st July, 1874, two of the trustees, under the corporate seal of the section, made application in writing to the council of the township of Tilbury East for authority to borrow $583, being the proportion of the township of Tilbury East of the sum of $1,144.70, and required the said sum to be paid, with interest thereon, in three equal annual payments.

On 25th November, 1874, a similar application was made by the same trustees, under the corporate seal of the section, to the council of the township of Raleigh, for the sum of $130 for the same purpose.

The council of Tilbury East took no notice of the application, but the council of Raleigh on 25th November, 1874, passed a by-law for the raising of the $130 in the terms of the application.

The apparent inequality of the sums required from the two townships, and the apparent deficiency in the whole amount required, was explained as follows :—

Prior to the union, the Tilbury East part of the section (then section No. 6 in Tilbury East) had on hand $322.04 for building purposes (their school house having been burned down.) After the passing of the resolution of 13th

July, 1874, directing a rate of five cents in the dollar to be imposed, applications were, as already mentioned, made by the trustees to the municipal councils of Raleigh and Tilbury East to pass by-laws to enable them to borrow money. The Raleigh Council passed a by-law, under which a debenture was issued, and the proceeds of this debenture, $130.00, were paid to the trustees of the union section. The application to the Tilbury East council not having been acted upon, the whole sum required from Tilbury had therefore to be raised by rate. The Tilbury East part of the section was credited with the $322.04 on hand as above mentioned. The Raleigh part was credited with the $130.00 paid to the trustees by the Raleigh council, as above mentioned; and to realize the sum required from each part of the Union section required a rate of $3\frac{1}{4}$ cents to be imposed on that part of the section in Tilbury, and a rate of $2\frac{53}{100}$ cents on that part of the section in Raleigh, which was done.

Besides, there was a difference of values between the two townships. On a value of $800 in Tilbury East $24.05 was authorized to be levied, while on the same value in Raleigh only $20 was authorized to be levied.

On this basis a rate bill was on 7th January, 1875, made out for the section. On the same day, there being only two trustees present, (the third, although notified, not attending) the defendant Manning, who was one of the two trustees present, was authorized to collect the rate without compensation of any kind.

A warrant under the hands of the same two trustees (of whom Manning was one) and under the corporate seal of the section was made out, directed to the defendant Manning, and placed in his hands.

The name of Thomas Askew and his farm within the the section appeared on the schedule annexed to the warrant for $33.32.

Manning called upon him and demanded the taxes but he refused to pay. Hence the distress.

Counsel for the plaintiff asked the Inspector if he gave

notice of the intended alteration of the section. Counsel for the defendant objected to the question about notice in this action after the existence of the corporation had been proved.

The learned Judge rejected the evidence, holding that the corporation had been properly formed for the purposes of the present action.

At the close of the case, *Robinson*, Q. C., for the plaintiff, mentioned that there was an objection going to the formation of the school section not determined by the demurrer, viz., that there was no power under any circumstances to form a union section by adding to one section *parts* of other sections; and here they had assumed to form such a section by adding to section six in Tilbury parts of two sections in Raleigh, thus altering the boundaries of those two sections. He contended that the judgment on demurrer decides only that where there is power to form a section on giving a specified notice or complying with other formalities, and it is done without the proper notice, or some other formality is omitted, the constitution of the section is not open to enquiry in an action. That, he argued, may well be, but it might not follow that such enquiry was precluded when the section neither had nor could have been formed, and the trustees of it therefore never were or could have become a corporation.

It was also objected that the rate was unequal, and that the warrant could not be made by two of the trustees to one of the two signing it.

The learned Judge, without deciding any of the questions raised, found a verdict for the defendants, reserving leave to the plaintiff's counsel to move to enter a verdict for the plaintiff upon any ground he saw fit.

During Easter term, May 27, 1876, *C. Robinson*, Q. C., obtained a rule *nisi* calling on the defendants to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff, on the ground that on the law and evidence the plaintiff was entitled to recover, the taking and detention of the plaintiff's goods by the

defendants not having been justified, and the defendants' pleas of justification not having been proved; that the school section for which defendants assumed to act as trustees was not shewn to have been legally formed or to exist, and it was shewn that the said section was illegally formed; nor was it shewn that the plaintiff was liable to be rated or levied upon for school purposes in any section for which defendants were trustees: that the taking of defendants' goods was illegal and unauthorized, the rate for which the goods were seized being unequal and the warrant under which said distress was made being insufficient and illegal; or for a new trial for rejection of evidence offered to shew that the section was not legally formed.

During Trinity term, September 8, 1876, *J. K. Kerr*, Q. C. shewed cause. The section was properly constituted, and, whether it was or not, the question was not one which could, according to the decision of the Court on the demurrers, be tried in this action: Consol. Stat. U. C., ch. 64, secs. 40, 41, 45, 46: The trustees having applied to the townships for authority to borrow the money necessary to build a school house and not having obtained the necessary authority, might afterwards use their own lawful authority: Consol. Stat. U. C., ch. 64, sec. 27. sub-sec. 12; 37 Vic., ch. 28, sec. 26 sub-sec. 14. As it was not contemplated or intended that the collector should receive remuneration for his services, there was nothing to prevent his being one of the two trustees who appointed him: Consol. Stat. U. C., ch. 64, sec. 27, sub-sec. 2; 23 Vic., ch. 49, sec. 6; 37 Vic., ch. 28 O., secs., 24, 25, 28, sub-sec 1; sec. 29, sec. 86, sub-sec. 1*a*, and the rate was not unequal: *Harling* v. *Mayville*, 21 C. P. 499.

C. Robinson, Q. C., contra. The addition of a portion of one section to another is not a union, but an alteration of sections: Consol. Stat. U. C. ch. 64, secs. 41, 45, 46; 23 Vic. ch. 49, sec. 55. Here there was no union of sections: *In re Proper and the Corporation of the Township of Oakland*, 34 U. C. R. 273. The plaintiff may be precluded from shewing in this action that the

defendants were not duly elected trustees, but ought not to be precluded from shewing that there is no section for which they can be trustees. The warrant not being signed by a majority of the trustees, excluding the collector, is not a valid warrant: 37 Vic. ch. 28, secs. 25, 28, 29. The rate is an unequal one: Consol. Stat. U. C. ch. 64, sec. 46; 37 Vic. ch. 28, sec. 51; *Harling* v. *Mayville*, 21 C. P. 499, 508. The trustees, after applying to the township councils for authority to borrow the money, have no power themselves to levy the rate: Consol. Stat. U. C. ch. 64, sec. 27, sub-sec. 12.

September 26, 1876. HARRISON, C. J.—The Common or Public School Acts for the past twenty years have made a plain distinction between the alteration of the boundaries of a section and the union of two or more school sections.

The Courts in several cases have recognized this distinction and endeavoured to give effect to it: See *Re Gill and Jackson et al.*, 14 U. C. R. 119; *School Trustees of School Section No. 2 in the Township of Moore and McRae*, 12 U. C. R. 525; *In re Morrison and the Municipality of the Township of Arthur*, 13 U. C. R. 279; *In re Ness and the Corporation of the Township of Saltfleet*, Ib. 408; *In re Ley and the Municipality of the Township of Clarke*, Ib. 433; *School Trustees of School Sction No. 4 in the Township of Hallowell and Storm*, 14 U. C. R. 541; *In re Hart and the Municipality of Vespra and Snnnidale*, 16 U. C. R. 32; *In re Isaac and the Municipality of Euphrasia*, 17 U. C. R. 205; *In re Proper and the Corporation of the Township of Oakland*, 34 U. C. R. 266, 273.

The power to form and alter school sections at discretion was at one time vested in the council of each district: 9 Vic. ch. 20, sec. 9; and when this was the case there was no difficulty arising from the circumstance that the section proposed to be formed or altered consisted in parts of two or more townships. See *In re Ness and the Municipality of the Township of Saltfleet*, 13 U. C. R. 408.

When the population of the Province increased, when

the number of school sections was correspondingly increased, and when the sections themselves became less in size, the power to form or alter sections was divided and attempted to be conferred on smaller bodies than district councils, such as township councils, &c.

The power to take from or to add to the boundaries of a school section, or to form two or more sections in a union, is a legislative power which can only be exercised by the Legislature of the Province, or those to whom the power has been delegated by the Legislature.

On 24th December, 1873, the reeves of the townships of Tilbury East and Raleigh, in conjunction with the Inspector of Public Schools for the county of Kent, assumed by by-law to form a new school section, formed, in part, of the whole of school section No. 6 in Tilbury East, with the addition of some lots and parts of lots from the township of Raleigh, and called it "Union School Section No. 2, Raleigh and Tilbury East."

Although called a union school section, it was not a union of school sections, but the addition to an existing section in Tilbury East of some parcels of land situate in the township of Raleigh—in other words, an alteration of the boundaries of an existing school section in Tilbury East by an increase of territory from an adjoining township.

But the question is not so much as to the name of the new section, as to the power of those who assumed to exercise it to form the new section in the manner and at the time they passed the by-law of 24th December, 1873

The statute in force at that time from which the power, if existing, could only be derived, was Consol. Stat. U. C, ch. 64, with amendments thereto.

Sec. 39. "Each township council shall form portions of the township where no school sections have been established into school sections; and shall appoint a person in each new school section to call the first school meeting."

Sec. 40. "In case it clearly appears that all parties to be affected by a proposed alteration in the boundaries of a

school section have been duly notified of the intended step or application, *the* (not *any*) township council may alter such boundaries. But no such alteration * * shall take effect before 25th December next after the alteration has been made."

Sec. 41. "In case at a public meeting of each of two or more sections called by the trustees for that purpose, a majority of the freeholders and householders of *each* of the sections to be affected, *request to be united*, then *the* council shall unite such school sections into one."

Sec. 43. "The several parts of any *altered* or *united* school sections shall have respectively the same right to a share of the common school fund for the year of the alteration or union as if they had not been altered or united."

Sec. 44. "In case a school site, school house, or other school property be no longer required in consequence of the alteration or the union of school sections, the same shall be disposed of * * in such manner as a majority of the freeholders and householders in the altered or united sections decide at a public meeting called for that purpose, and the inhabitants transferred from one section to another shall be entitled for the common school purposes of the section to which they are attached, to such a proportion of the proceeds of the sale of such school house or other common school property as the assessed value of their property bears to that of the other inhabitants of the common school section from which they have been so separated, and the residue of such proceeds shall be applied to the erection of a new school house, or to other common school purposes of such altered or united sections."

So far no provision is made for exercise of power by any other body than township councils, and can only be held to extend to school sections situate wholly *within* the particular township.

The 23 Vic., ch. 49, sec. 5, which repealed sections 45 and 46 of Consol. Stat. U. C., ch, 64, provided that, "Under the conditions prescribed in the 40th section in respect to

alterations of *other* school sections, *union school sections*, consisting of parts of two or more townships or parts of a township, and any town or incorporated village, may be *formed* and *altered* by the reeves and local superintendent or superintendents of the townships out of part of which such sections are proposed to be formed * * and each *union school section composed* of portions of adjoining townships, or portions of a township or townships and a town or incorporated village, shall, for the purposes of the election of trustees under their control, be deemed one school section, and shall be considered in respect to superintendence and taxation for the erection of a school house, as belonging to the township * * in which the same is situated."

These powers are in effect continued in the existing Public School Act : 37 Vic., ch., 28, sec. 48, sub-secs. 10 secs. 49, 50, 51.

Provision so far is made for :—

1. The alteration of the boundaries of a school section *within* a township by the the council of that township.

2. The union of two or more sections within a township by the council of that township, after a meeting of the freeholders and householders of each section requesting to be united.

3. The alteration of the boundaries of a *union school section*, although consisting of parts of two or more townships, by the reeves and local superintendents of the townships.

But no provision is made for the alteration of the boundaries of a school section (not being a union school section) consisting of parts of two or more townships.

Sec. 47 of Consol. Stat. U. C. ch. 64, enacts, that "Each township council may, under the restrictions imposed by law in regard to the alteration of school sections, *separate* such part of any *union school section* as is situated *within* the limits of its jurisdiction from the union of the sections, and may form the part so separated into a distinct school

section, or attach it to one or more existing school sections or parts of sections within its jurisdiction, as such council shall judge expedient."

Sec. 92 enacts, that "The local superintendents of adjoining townships shall determine the sums to be paid from the common school fund of each township in support of the schools of *union school sections* consisting of portions of such townships; and shall also determine the manner in which sums shall be paid."

Sec. 93 enacts, that "In the event of the local superintendents of the townships thus concerned not being able to agree as to the sum to be paid to each such township, the matter shall be referred to the warden of the county for final decision."

We can only judge of the intention of the Legislature from the language which the Legislature has used.

The Legislature has provided for the formation and alteration of boundaries of school sections *within* a township, and for the formation and alteration of boundaries of *union school sections*; but has not provided for the alteration of the boundaries of a school section by the addition to that section of land in an adjoining township, unless we read the words "union school sections" as meaning not only a union of school sections, but a union of parts of different sections in different townships to form *one* school section.

We cannot do so without giving to the language used a forced construction, and one which the words do not naturally bear.

The only provision in the Act for the formation of a union school section is, that contained in sec. 41, which speaks of it as the union of "two or more sections."

There cannot be a union of sections unless there be at least two sections to form the union. There may be a union of parts of two sections; but where the result is only one section, it cannot, with any propriety of language, in a School Act or any other Act, be denominated "a union school section."

It is safer that we should allow the Legislature to supply its own omissions or correct its own errors than that we should, under the guise of interpretation, assume to legislate.

The conclusion at which we have arrived is, that the Legislature have omitted to provide for the formation or alteration of a section consisting of parts of two or more townships, &c., and this is what the reeves of Tilbury East and Raleigh, in conjunction with the County Inspector of Schools, has, without legislative authority, attempted to do.

Where there is power to do a thing, and the only question is, whether the power has been regularly exercised, and the enquiry is into a matter of fact, which may be differently found by different tribunals, and the right to office depends on the finding, it is only proper to hold, as we did in this case, that the enquiry can only be properly made in some proceeding where the question will be once for all so decided as to bind the rights of all parties concerned.

When this case was before us on demurrer it was assumed that the reeves and county superintendent had power *after notice* to alter the boundaries of a school section in one township by adding to it a portion of a school section in an adjoining township, and the Court on that assumption held that the plaintiff could not in this action, as against the defendants in office, dispute that—the fact as to notice, but must try it in another proceeding where the finding would be final and bind all parties concerned.

If the law on this point were otherwise the effect might be, that in a suit by one ratepayer, a jury would find a sufficient notice, and in a suit by another ratepayer, a jury might find no sufficient notice, so that in the one case it would be held that the alteration was properly made and in the other the reverse.

Such procedure if permitted could manifestly only end in confusion.

But where the question is not merely the regular exercise of power, but the possible exercise of power, and there

is no dispute and can be no dispute as to the facts, there is no reason why the question of *law* should not be determined in any suit where it properly arises for decision.

Our decision of the demurrers proceeded chiefly on the authority of *Penney et al.* v. *Slade*, 5 Bing. N. C. 319; and *Re Gill and Jackson*, 14 U. C. R. 119.

In *Penney et al.* v. *Slade*, 5 Bing. N. C. 319, there was power to appoint overseers, and the only question was, whether the persons assuming to hold that office had been duly appointed.

Tindal, C. J., on delivering judgment said, at p. 331, "It is obviously a much more convenient course that *the validity of the appointment* should be brought into controversy in a direct way immediately upon the appointment, than that a party should lie by till a rate has been made and levied, and should then be allowed to revert back to *some miscarriage* in the appointment. No objection arising in such a way ought to prevail, *unless it rests on the most solid ground*, which in our judgment the present objection does not."

In *Re Gill and Jackson*, 14 U. C. R. 119, the question was, whether the trustees claiming to act, or a different body of trustees, were entitled to the office.

Sir John B. Robinson, in delivering judgment, said, at p. 126, 127: "However, there was an *unfortunate irregularity* to this case, the resolution (if that alone would have sufficed in make the alteration) not specifying with any distinctness what was thereafter to form section No. 7, and what to form section 11. * * * But, independently of the question whether the local superintendent's decision upon the point can thus be incidentally overruled in an action, the learned Judge left out of view that the trustees who imposed and received this rate were the trustees *de facto*, and that, until *they are removed*, the acts which they do in the ordinary current business of trustees must of necessity be upheld, or everything would fall into confusion."

In our former decision we meant to follow these authorities; we did not intend to go any further.

We are not concluded by our former decision or by these authorities, where the objection, so far from being a mere question of irregularity, rests on the broad foundation of entire want of power, from deciding the question where it properly arises between parties interested in the result.

It is impossible in any Act of Parliament intended to regulate the conduct of men in the transactions of life to provide for all possible cases. Experience shews that the best framed Acts of Parliament are imperfect. Further legislation is required where unforeseen difficulties present themselves.

The present School Act is still imperfect. It not only omits to provide for the addition to a section in one township, of land in an adjoining township, but also omits to provide for the equalization of the assessments as between the persons residing in the two municipalities affected by the change. It also omits to provide for the adjustment of assets, other than an existing school house property, &c., as between the ratepayers residing in the different municipalities.

In the absence of legislative light on these different points, the trustees of this school section have endeavoured to be a light unto themselves. Each step they have taken from the first is only a further and a further plunge into darkness. The sooner their career is stopped the better for themselves, and the betterfor the distracted ratepayers.

The by-law of 24th December, 1873, was in our opinion passed without any legislative authority, and must on that ground fall; and with it falls all that was afterwards done resting on the foundation of its validity.

The rule will be absolute to enter a verdict for the plaintiff for $5 (*a*).

Rule accordingly.

(*a*) See also *Halpin* v. *Calder*, 26 C. P. 501.

Christopher Irwin, Administrator, &c., of William Irwin v. Bank of Montreal.

Intestacy—Administration obtained by fraud—Payment made under—Subsequent administration—Liability—Deposit receipt—Construction.

One I., who died in 1870 in Ireland, had deposited money at the branch of defendants' bank in Cobourg in 1869. Letters of administration were granted on 25th April, 1872, by the Probate Court of the District Registry at Ballina in Ireland, to J. G., at whose house I. died, who represented himself to be his cousin german and only next of kin. An exemplification thereof was recorded in the Superior Court of Montreal, and on this the bank, in September, 1872, paid over the amount to G.'s attorney in Montreal, who handed to them the receipt which he had obtained from G. It appeared however that G. had obtained the administration by fraud, not being I.'s next of kin. In August, 1872, administration was granted by the Court of Probate in Ireland to the plaintiff, I.'s brother, and in May, 1872, the plaintiff notified defendant's manager at Cobourg not to pay over any money except to himself.

The evidence shewed that the Probate Court at Ballina had power to grant the administration, and by the C. S. L. C. ch. 91, the administrator of any one dying abroad is recognized and has the same power in Lower Canada as in the country where he was appointed or resides.

Held, 1. That the Ballina administration, though obtained by fraud, was valid until revoked by some express judicial act, and was not revoked by the mere issue of the Dublin grant.

2. That by the Lower Canada law J. G. was entitled under that grant to receive payment in Montreal.

3. That although the money was payable at Cobourg, defendants paid it rightfully at their head office at Montreal

4. That defendants were bound to pay it on demand made under the Ballina grant, notwithstanding the notice served on them.

5. That it was a payment made in Montreal in good faith to the ostensible creditor, under article 1144 and 1145 of the L. C. Code Civile.

Remarks upon the necessity for some amendment of the law, in order to prevent the obaining letters of administration by fraud and without giving security.

Action on the common counts.

Pleas: 1. Plaintiff not administrator. 2. Never indebted. 3. Payment.

Issue.

The action was for the amount of a deposit receipt for $1456 and interest, in favour of William Irwin deceased.

The cause was tried at Peterborough at the Fall Assizes, of 1875, before Hagarty C. J. C. P.

Letters of administration to the plaintiff, with the will annexed, from the Surrogate Court of the United Counties

of Northumberland and Durham, dated the 31st of May, 1873, were put in.

Letters of administration to John Irwin, the lawful attorney of the plaintiff, with the will annexed, from the Court of Probate, Ireland, dated the 13th of August, 1872, (the grant was made until the plaintiff should apply for and obtain letters of administration himself,) were put in.

A deposit receipt given by defendants at their bank in Cobourg, on call, dated 8th May, 1869, to Wm. Irwin for $1,456, to be accounted for to him at four per cent., signed by the manager at Cobourg, endorsed by James Gardiner of Sligo, and Wm. Irwin by his mark, was put in.

Also a notice, dated 17th May, 1872, from the plaintiff to the manager of the defendants' bank, Cobourg, that, as brother and heir-at-law of the late Wm. Irwin, he claimed all moneys, securities, and other property of William Irwin, which he died possessed of or entitled to, with any interest thereon or accumulation thereof, and that he having given no power or authority to any person or persons to ask for, demand, or receive the same or any part thereof, he forbid the Bank of Montreal to pay over to any person or persons applying for the same any moneys of the said Wm. Irwin in its bank agency at the town of Cobourg or elsewhere other than to himself personally, or, in the event of his death, to his representatives in law.

The notice appeared to be served on Mr. Despard, the bank manager at Cobourg, on the 20th of May, 1872.

The following letter from the defendants was also put in :—

"BANK OF MONTREAL.

"Montreal, 18th December, 1873.

"DEAR SIR,—The money ($1,456) alluded to in your letter of the 16th instant was deposited by William Irwin at the Cobourg branch of this bank on the 8th of May, 1869, and he having died at Sligo, in Ireland, in 1870, it was paid with interest at four per cent. by the bank to James Gardiner, of Sligo, as administrator of the personal estate

and effects, in September, 1872. In the letter of administration, Gardiner was stated to be "the cousin-german and only next of kin of the said intestate.

"Yours truly,

"W. H. SCOTT, Esq., J. M. CHRISTIAN,
"Solicitor, Peterborough. Manager."

It was objected at the close of the plaintiff's case that the money on the deposit receipt was only payable at the head quarters of the bank, which are in the Province of Quebec, and an Ontario administration did not affect them.

For the defence *Charles Ferreaux*, Deputy Prothonotary to the Superior Court, Montreal, produced the exemplification of letters of administration granted by the Probate Court of the District Registry at Ballina on 25th of April, 1872, of the estate and effects of Wm. Irwin, deceased, who died intestate to James Gardiner, of Sligo, in the county of Sligo, sailor, the cousin-german and only next of kin of the intestate.

The instrument was recorded in the Superior Court of Montreal, in the office of the Prothonotary, on the 5th of September, 1872, on the petition of James Gardiner, by Messrs. Devlin & Paver, advocates, his attorneys, of the 31st of August, 1872, who produced an exemplification of the said letters of administration of the personal estate and effects of William Irwin, formerly of Cobourg, Canada, and late of Sligo, in the county of Sligo, yeoman, deceased, who died on or about the 30th of June, 1870, at Sligo intestate, and prayed that the exemplification be ordered to be received in the office, in the district of Montreal, of the Superior Court for Lower Canada, according to law. Upon which the exemplification was filed, and authentic copies of the same were directed to be delivered according to law, and the copy produced was duly certified to be a true copy of the original documents remaining of record in the archives of the Court.

The witness continued—The effect of the exemplification would be to authorize payments under it. I am a notary, not an advocate. I have to study five years for this.

There is no such thing as a Court of Probate. As a notary, I would, if required, attend to testamentary business. This matter was done according to law. It is settled either by the Code Civile or by statute. If there is no will, a curator would be appointed to minors or absentees. If no will, and an adult only son, he inherits all and sues. There are no letters of administration. I think what was done gave to the party the right to collect debts, and to sue and be sued. Nothing appears in our records to call in or cancel this prosecution. It can be done by the Court.

Cross-examination—Certified copies of the whole proceedings are given to any parties demanding them. I cannot say what rights they exercise under them. I think they gave Gardiner the right to sue. This proceeding rendered the Irish grant *public*. I refer to C. S. L. C. ch. 91. My opinion is, he had to take these proceedings before he could do so. I look at the Consolidated Statutes. This contains the Code Civile of Lower Canada, promulgated by authority.

Edmund Massey—I am a notary. I look at the power of attorney annexed to commission. I received it from Gardiner from Ireland. It is a power to me. I look at deposit receipt; I think it came to me with this power. I applied to defendants for the money on this. The bank paid me $1,643 and some cents on 7th September, 1872. I gave them a discharge same day under Gardiner's power. I executed it before a notary—Devlin. The money was sent by mail, 11th July, 1873, £300 stg. Afterwards I got a discharge from Gardiner, 29th December, 1873. I gave up the deposit receipt to defendants on getting the money. I acted in good faith.

Mr. Christian—I was bank manager of the Bank of Montreal in Montreal. I remember the affair. I recognize the deposit receipt; it was paid at Montreal. It was probably *bonâ fide* on the part of bank and done under legal advice.

Cross-examination—I had no knowledge of any notice served on defendants. My recollection is very indistinct

of these matters. I paid it in Montreal on advice of bank solicitor. It was a common thing to pay a deposit receipt at an office other than that giving the receipt, unless there was something to call for enquiry. It is a year since I left this bank. The amount paid over was charged to Cobourg agency.

The plaintiff's examination, taken on the 29th of May, 1874, was put in. It was, to the effect, following :—

I am a brother of deceased. He was the eldest son; I was the second. There was a boy, John, who died thirty years ago. Never had any other brother, nor any sister. Deceased was in this Province many years. He was a school teacher; did no other business. He made his money by speculation in real estate. Never heard of his being married. He left this country for Ireland, I think in 1868. He said he went for the benefit of his health. He told me he would live and die at home in the old country. I don't think he thought himself dying when he left. I did not know he had made a will till after he went home, and I got a letter to say he was dead. He was in the habit of making wills in this country and destroying them again. I never heard of his making a will, left in Mr. Kerr's hands, until Mr. Kerr wrote to me of the deceased's death. He sent me a copy of the will. I am left a life interest in the property mentioned in the will. I became aware of his death within five or six months after it, from John Irwin, a cousin, and before I heard from Mr. Kerr of a will. John Irwin is the man I sent a power of attorney to. He had informed me deceased had made a will in Ireland. The letter is dated 8th March, 1871. The Mrs. Gardiner with whom my brother died, and referred to in the letter, is wife of a person in Ireland who I heard had administration given to him. The Gilhoolys mentioned in the letter are the same parties to whom deceased left his property. [Will produced made in Ireland, Sligo, dated 6th May, 1870.] The brother John, mentioned after the Gilhoolys, is a brother of theirs; and the McMullen mentioned married a sister of theirs, and I am cut off with a shilling. I have

realized under my letters of administration $450, paid me by the Bank of Montreal, Peterborough, and I have also received all the money that was due on the mortgage mentioned in the will. The Gilhoolys are cousins of mine. I saw them last at the date of the assignment from them to me, about three years ago. The assignment was under seal and signed by all the parties who were alive. I gave them $1 each—all they wanted. They said I was entitled to the property. I promised nothing further to them. I shewed a copy of the Sligo will to the parties before they executed the assignment. I had acquired all their interest in the property under the will. I saw James Gardiner when I was in Sligo in August, 1872. I offered him no inducement to give up papers. I did not know at that time that he had obtained letters of administration; he is not a man of any means. I first became aware of letters of administration having been granted to some one last winter, and only lately did I know they were to Gardiner. I am aware my brother held a deposit receipt from the Bank of Montreal. He died at Gardiner's house. I demanded papers from Gardiner, and he said he would not give them up until he was well paid for them. I asked for all property; I asked for a deposit receipt, and I mentioned in particular the Savings Bank pass book. Gardiner is no relation of my family, as far as I know. When I demanded papers from him, he did not name any sum he required. I know nothing about the endorsation of the deposit receipt by the deceased; heard nothing of it in Ireland. There has been no proceeding in Ireland to bring him to account as far as I know.

There was a great deal of evidence taken under a commission in Ireland. The effect of it was, that the deceased for more than two years before his death lived with James Gardiner in Sligo, and died there. While he was there, the Gardiners, husband and wife, said he gave the deposit receipt to Mrs. Gardiner. The husband said that Wm. Irwin had his name written on it by way of endorsing it, and that he put his mark to it.

The evidence went to shew that the story was false, and that Gardiner and some one else, probably a Mr. Wilkin, conspired to get hold of and make use of the receipt for their own use, as they agreed to divide the amount between them, which they ultimately did.

After Wm. Irwin's death, Wilkin tried to collect it in Ireland, and afterwards sent it to Montreal by some one to collect; but it was found it would not be paid without letters of administration, if there was no will. The parties in Ireland then applied for administration as to an intestate estate. James Gardiner made oath that he was "a cousin of the deceased and his only next of kin," and upon that administration issued to him from the Court of Probate, the District Registry of Ballina, within which district Wm. Irwin died, no security being given by the applicant, because he was represented to be the next of kin of the deceased.

The relation of James Gardiner to Wm. Irwin was established in this manner. James Gardiner's sister became the second wife either of Wm. Irwin's father or of his father's brother after Wm. Irwin was a grown-up man, and so James Gardiner made himself out to be the cousin-german and sole next of kin of Wm. Irwin.

The letters of administration were sent to Montreal, and after being duly filed in the proper Court there and an exemplification issued of them, and on presentation of the exemplification and deposit receipt at the bank in Montreal, the money was paid over.

After Gardiner had got administration, but before the money was paid under it, the plaintiff visited Ireland and saw Gardiner, and claimed the papers and property of the deceased, but he did not get them, nor did he tell of the administration he had got. And it appears also that Gardiner and his wife knew all along that the deceased had a cousin of the name of John Irwin, who lived not many miles from them.

A Mr. Bourke, an Irish attorney and solicitor residing at Ballina, gave evidence as to the respective powers of

the district registry of Ballina, and the principal registry Dublin, to grant probate in this matter. This evidence is fully set out in the judgment.

At the close of the evidence the defendants' counsel referred to the Code Civil Articles 1144, 1145, as to payments made in good faith to an ostensible creditor.

The learned Chief Justice noted: I enter a verdict for defendants, almost *pro formâ*, with leave to the plaintiff to move to enter it for him for the amount of the deposit receipt and six per cent. from the time the money was first refused to be paid on demand of the plaintiff, the 31st of May, 1873. The Court to have power to draw inferences, although this consent may not be necessary. It is hardly denied that a very gross fraud was committed by Gardiner in obtaining the grant of administration from the District Registry at Ballina. Three months after, a grant of administration, with the will of the deceased annexed, was made by the Court of Probate at Dublin to John Irwin, as attorney for the plaintiff. The plaintiff afterwards obtained administration, with the will annexed, from the Surrogate Court of Northumberland and Durham. The bank, on the Ballina grant being duly enrolled, paid the money to Mr. Messier, acting for Gardiner, and after taking legal advice. The defendants did not take any notice of the written notice of the 17th May, 1872, served at their agency in Cobourg. There is no attempt to impute bad faith to the bank in making the payment. It is a very hard case. I can here only find a verdict on first impression. The defendants rely chiefly on the statute law of Lower Canada—the Code Civile—and on the protection given to payments made to persons who are ostensible creditors.

Verdict for defendants.

In Michaelmas term, November 18, 1875, *Hector Cameron*, Q.C., obtained a rule calling on the defendants to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff on the leave reserved for $1,456,

with interest at four per cent. from 8th May, 1869, to the 31st May, 1873, and at six per cent. from the last named day, on the ground that on the law and evidence the verdict should have been entered for the plaintiff, and that the payment made by the defendants to the attorney of James Gardiner forms no answer to the plaintiff's claim.

In Hilary term, February 18, 1876, *Armour*, Q.C., shewed cause. The defendants claim to be protected because they paid the money under the Ballina administration, which has never been revoked, and without notice on their part that administration with the will annexed had been granted in Dublin to John Irwin for the plaintiff. The Imperial statutes are, the 20 & 21 Vic., ch. 77, applicable to England, and the 20 & 21 Vic., ch. 79, applicable to Ireland. Section 50 of the last Act sustains the Ballina grant. The statute itself names the districts, and Sligo, where Wm. Irwin died, is within the Ballina district. That Court had jurisdiction to grant the administration because Wm. Irwin died within it. See secs. 80, 82, 83, of the same Act. In the Province of Quebec there is no such thing as letters of administration ; on death, succession goes to the heir : C. S. L. C. ch. 91, secs. 1, 3. Gardiner could have sued the defendants in Montreal under the Ballina grant: Code Civile, article 1140. Article 1145 of the Code Civile protects payments made in good faith, and Gardiner had the possession of the deposit receipt, and he was the administrator of the estates and effects of the depositor. And by the general law such a payment is a good payment: *Story's* Conflict of Laws, 7th ed., secs. 512, 515 ; *Doolittle* v. *Lewis*, 7 Johns. Ch. 45, 49 ; *Mickie* v. *Cox*, 18 How. 114 ; *Westlake's* Private International Law, secs. 298, 299 ; *Whyte* v. *Rose*, 3 Q. B. 493 ; *Huthwaite* v. *Phaire*, 1 M. & G. 159 ; *Mander* v. *The Royal Canadian Bank*, 20 C.P. 125; *Maunder* v. *The Royal Canadian Bank*, 21 C.P. 492. This deposit receipt, although it was given at Cobourg, in Ontario, by the defendants, was *bona notabilia* at Montreal, in the Province of Quebec,

where the defendants resided and have their principal place of business. The authorities are divided, which are referred to in *Williams* on Executors, 7th ed., vol. i., 574, 575, as to whether the grant of later letters of administration are a revocation of those which were first granted: *Pratt* v. *Stocke*, Cro. Eliz. 315. *In re Thorpe*, 15 Grant 76.

Hector Cameron, Q. C., supported the rule, with him *Bethune*. The defendants were not bound to pay the deposit receipt at any other of their offices than at Cobourg, where it was granted; and they had notice at Cobourg long before they paid the money, not to pay it. Yet they did pay it at Montreal without communicating with the Cobourg office. The defendants, it was said, were entitled on paying the money at Montreal to charge commission as on a transaction between Montreal and Cobourg. The General Banking Act, 34 Vic. ch. 5, D., applies to the defendants. The debt was due at Cobourg, not at Montreal, and anything done in Montreal under the Ballina administration was of no value so far as it related to the debt, which was payable in Cobourg. It was not an asset in the Province of Quebec. The Ballina grant of administration was impliedly revoked by the Dublin administration. The former was on a supposed intestacy. The latter was upon a will which named no executor. Wm. Irwin had not changed his Canadian domicile, although he left this country and died in Ireland: *Story's* Conflict of Laws, 7th ed., sec. 514; *Preston* v. *Mellville*, 8 Cl. & F. 1, 12, 14. It is a moot point whether payment to a foreign administrator is a good payment or not: *Attorney General* v. *Bouwens*, 4 M. & W. 171, 190. If this debt were not *bona notablia* in Quebec, the plaintiff has no case. The notice given to the defendants at their branch at Cobourg not to pay the money was a good notice affecting them at their office in Montreal: *Grant* on Banking, 382; *Willis* v. *Bank of England*, 4 A. & E. 21, 38; *Mayhew* v. *Eames*, 3 B. & C. 601; *In re Brown* v. *London and North Western R. W. Co.*, 4 B. & S. 326, 337; Banking Act, secs. 4, 54. The deposit receipt was payable at Cobourg: Code Civile, Article 607; *Attorney-General*

v. *Dimond*, 1 Cr. & J. 356, 1 Tyr. 243; *Wharton's* Conflict of Laws, sec. 626. By the law of Lower Canada the foreign administration is only to have the like effect that it would have in the country where it was granted. If the Ballina administration were revoked in Ireland by the Dublin administration, the payment which was made by the defendants after the granting of the Dublin administration, was void. And there cannot be two effective administrations in the same country at the same time Wills and Powers of Attorney may be exemplified in Quebec, but not Letters of Administration. He further referred to the Code Civile, Articles 1144, 1145, 1152.

March 17, 1876. WILSON, J.—There is no dispute of facts. It is questions of law alone which have to be decided. The chief question is, whether the payment made by the defendants at Montreal on the deposit receipt to the attorney of James Gardiner, the administrator under the Ballina letters of administration, was a good payment But that is dependent on a number of other enquiries.

1. Was the Ballina grant of administration in itself, if there had been no other opposing administration, a valid grant?

2. Did the parties proceed regularly under it in the Province of Quebec to entitle the administrator to receive payment of the deposit receipt in Montreal?

3. Was the money payable at Montreal or at Cobourg, the place of deposit being Cobourg?

4. If payable at Montreal, was the notice given by the plaintiff to the defendants at their branch at Cobourg, long before they paid the money at Montreal, a sufficient notice to the defendants not to pay it?

5. If the defendants are to be considered as notified at Montreal, could they regard the notice not to pay when the person authorized under the Ballina administration demanded payment?

6. Did the defendants pay the money in good faith to a person who was an ostensible creditor?

7. If they did, are they protected by the law of Quebec?

8. Did the subsequent grant of the Dublin administration revoke the Ballina grant?

9. If it did, and, (assuming the notice to the defendants had not been given or was not a sufficient notice,) the defendants had no notice of such revocation, was the payment they made a good payment?

As to the first question, Mr. Bourke, an attorney and solicitor of the Courts of law and equity in Ireland, who resides at Ballina in the county of Sligo, and who took out the administration for James Gardiner, said: "I have no doubt the district registry of Ballina had jurisdiction to grant administration to the goods of the deceased, William Irwin. The course of proceeding is, that the solicitor for the applicant lodges a notice with the district registrar of such application, which he forwards to the registrar of the principal registry in Dublin. On receipt of reply permission or not is given, and thereupon the preliminary documents are prepared and sworn, and grant is issued. The district registrar has his appointment under the statute 20 & 21 Vic. ch. 79, and exercises jurisdiction in pursuance of the statute. His jurisdiction to grant administration is confined to non-contentious cases, and the application to the principal registry is for the purpose of ascertaining whether contention has arisen or whether a grant had been previously made."

The statute to which we were referred, 20 & 21 Vic. ch. 79, relating to Ireland, enacts:

Sec. 50. That probate or letters of administration may, on application to the district registry for that purpose, be granted in common form by the district registrar in the name of the Court of Probate and under seal, if it shall appear by affidavit of the person applying that the testator or intestate, at the time of his death, had a fixed place of abode within the district in which the application is made such place of abode being stated in the affidavit; and all such grants by the district registrar shall be deemed grants by the Court, and shall have effect over the personal estate of the deceased in all parts of Ireland accordingly.

Sec. 80. After grant of administration, no person shall have power to sue or otherwise act as executor of the deceased as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked.

Sec. 82. When any probate or administration is revoked under this Act, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof, shall be a legal discharge to the person making the same—and provision is made as to retainer by such executor or administrator.

Sec. 83. All persons or corporations making, or permitting to be made, any payment or transfer *bona fide* upon any probate or letters of administration granted in respect of the estate of any deceased person, under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration.

The general rule of law is, that the person before whom the testament is to be proved is the ordinary of the place where the testator dwelt, and if all his goods and chattels lie within the jurisdiction of the bishop of the diocese within which he died, a probate before that bishop or his officer is the only proper one: *Attorney General* v. *Bouwens*, 4 M. & W. 171, 191.

The Ballina administration was certainly obtained upon a fraud, for James Gardiner was not the cousin of the deceased, nor his sole next of kin, and he knew it; but he took such proceedings in order to appropriate the effects of the deceased which he could lay hands on to his own use and to that of the other or others who were in league with him.

But, notwithstanding that, by the general rules of law the administration is valid so long as it is unrevoked, although it is based on a forgery: *Allen* v. *Dundas*, 3 T. R. 125; *Prosser* v. *Wagner*, 1 C. B. N. S. 289; and all payments made under it are deemed to be good payments,

and to discharge the persons paying from liability, although the grant should be afterwards rescinded: *Ib.*

The grant of administration is a proceeding *in rem: Taylor* on Ev., 6th ed., 1488; *Duchess of Kingston's case*, 2 *Smith's* L. C., 7th ed., 802; *Noell* v. *Wells*, 1 Lev. 235, 236; *Allen* v. *Dundas*, 3 T. R. 125. It has constituted the person therein named administrator, whose position as such, cannot be questioned while it stands, if the Court had jurisdiction, and if the person on whose supposed death the administration has been issued, be really dead.

It is doubted whether the grant of a second administration is of itself a repeal of the first, or whether it requires a judical sentence to avoid it: 1 *Williams* on Executors, 7th ed., 574. In *Pratt* v. *Stocke*, Cro. Eliz. 315, it was held that the grant of administration could only be revoked by a judical sentence.

Re Langley, 2 Rob. Eccl. Rep. 407, where letters of administration had been granted to a woman upon her fraudulently swearing she was the lawful relict of the deceased, a decree issued against her to bring in the letters and to shew cause why they should not be revoked and administration granted to the rightful widow. The woman could not be served. The Ecclesiastical Court under these special circumstances decreed the first administration to be void, and granted administration to the lawful widow, although the Court was "very unwilling to allow a second administration to be issued until the first be brought in, for there is a difficulty in permitting two administrations to be out together."

Re Sparke, 17 Jur. 812, administration with the will annexed was granted in November, 1833. The administrator not having been heard of since 1834, administration in 1854 was granted to a legatee; the original administration being revoked though not brought in.

The grant operating *in rem*, and the Act being valid as a judicial Act until revoked, I think the general law is, that the grant, although obtained by fraud, retains its validity until it is revoked by some express judicial Act

declaring it void. The two cases last referred to shew that such a decree was pronounced, although the letters could not be got in and cancelled; and the case of *Pratt* v. *Stocke*, Cro. Eliz. 315, is expressly in point. The Ballina grant therefore was not revoked by the mere issue of the Dublin grant, and by statute the Ballina grant had effect all over Ireland. Section 80 of that statute appears also to sustain the view that the letters granted first could not be rescinded by the mere issue of the second grant of letters, for the enactment is, that no subsequent grant shall be made until the first has been recalled or revoked. The Dublin grant should not therefore have been made until the Ballina administration was recalled or revoked. I am of opinion that the Ballina administration was and is a valid grant up to and at the time of the payment by the defendants.

As to the second question, we have been referred to the C. S. L. C. ch. 91.

The first section is, that: "All executors of wills, and all administrators, or other legal representatives of the estate of any person dying in or out of Lower Canada, but seised of real or personal effects or rights of action there, and all other persons who, either by the law of Upper Canada or by the law of any country or State whatever where the deceased died or made his will, are legally seised of the estate of the deceased or represent him in law, shall be recognized, and the legal capacity of any such executor, administrator, or representative shall be of equal validity and effect, by and before all Judges and Justices, and by and before all Courts in Lower Canada, and to all other legal intents, as in the country or place where he or they reside or were named and appointed, or where the will of the deceased was made, notwithstanding that such executor, or administrator, or representative, resides out of Lower Canada."

Sec. 2. * * "All persons on whom by any properly constituted authority or law (whether of the heretofore Province of Upper Canada, or of the Imperial Parliament of Great

Britain and Ireland, * * or of any of them, or of any other foreign state, colony or dominion), the right or power of suing or being sued has been conferred, shall have the like capacity in Lower Canada, to bring and defend all actions, suits, plaints, bills, and proceedings whatsoever, and shall, by and before all Courts, Judges, and judicial authorities whatever in Lower Canada, be held in law to be capable of suing and being sued, in the same name, manner, and way, as they could or might respectively be within the jurisdiction wherein such executors or administrators, or persons, bodies politic and corporate, joint stock companies or associations of persons were respectively created, erected, or recognized."

The Lower Canada Acts apply to the registration of exemplifications of wills or the probates of wills, and declare that the certificate of the Prothonotary of the Superior Court in which it is registered shall have the same force and effect as such exemplification: C. S. L. C. ch. 90, secs. 6, 9.

It does not apparently apply to letters of administration or to any exemplification of them.

Notwithstanding that, the administrator of an estate, by virtue of ch. 91, just recited, can use his letters of administration in Quebec with the like validity and effect as in the country or place where he resides or where he was named and appointed, and sue in like manner as he could within the jurisdiction where the grant was made. It was not necessary, therefore, as a preliminary to a legal payment by the defendants, that the letters should have been recorded or filed or certified in any manner.

And as there is no such ceremonial or mode or course of procedure in the Province of Quebec as having probate of a will or letters of administration to an estate, the law there permits the administrator who is so lawfully in any foreign country to act upon such letters in Quebec in like manner as he could in the country where they were granted.

I answer the second question in the affirmative.

The third question is, whether the money was payable at Montreal or at Cobourg?

In *Willis* v. *The Bank of England*, 4 A. & E. 21, 38, an Act is referred to which expressly made bank post bills issued by branch banks payable *there* as well as at the principal office in London.

In *Mayhew* v. *Eames*, 3 B. & C. 601, a notice given at the principal office is a notice to all the agencies of the person. See also *Willis* v. *Bank of England*, 4 A. & E. at p. 39.

In *Re Brown* v. *London & N. W. R. W. Co.*, 4 B. & S. 326, a company dwells at its principal place of business, and therefore it cannot be sued at a place where a very considerable part of its business was done.

Each branch of a bank is to be considered as a separate holder for the purpose of giving notice of dishonour: *Clode* v. *Bayley*, 12 M. & W. 51.

A person who had bound himself not to set up, embark in, or carry on business in certain places, was held to have broken his agreement by soliciting orders in those places and fulfilling them from his store of goods outside of these limits. It was carrying on business within the prohibited places: *Re Turner* v. *Evans*, 2 E. & B. 512.

In *Woodland* v. *Fear*, 7 E. & B. 519, a joint stock banking company carried on business at various places, amongst others at G. and B. Each branch kept separate accounts, had separate customers, and in all respects transacted business like separate banks. Defendant held a cheque drawn by a customer of the bank at G. on that branch, and he got it cashed at B. branch. The cheque was without laches forwarded by the B. branch to the G. branch. When it was cashed at B. the balance of the customer in G. branch exceeded the amount of the cheque, but when it arrived at G. that balance had been paid away and the cheque was dishonoured. The company sued the defendant for money had and received, by reason of the failure of consideration:—Held, the bank was entitled to recover, as the B. branch could not under the circumstances be considered as honouring the cheque nor as purchasing it, but as taking it from the

defendant on his credit, as they might have done a cheque drawn on any other bank; the circumstance that the banks at G. and B. were branches of the same company being for the purpose immaterial. Lord Campbell said at p. 521 : "The cheque was not drawn on the bank generally, but on the banking company at Glastonbury, and that, coupled with the fact that the drawer kept his account and his balance only there, shews that the Bridgewater establishment was not bound to honour his cheque (even supposing he had assets at Glastonbury) as a banker under the same circumstances is bound to honour the check of his customer. To hold that the customer of one branch, keeping his cash and his account there, has a right to have his cheques paid at all or any of the branches, is to suppose a state of circumstances so inconsistent with any safe dealing on the part of the banker that it cannot be presumed without direct evidence of such an agreement."

The statutes affecting the defendants' bank are their Charter Act, 19-20 Vic. ch. 76, and the General Bank Act, 34 Vic. ch. 5.

The chief seat or place of business of the defendants' bank is in the city of Montreal : 19-20 Vic. ch. 76, sec. 3. And they may open and establish branches or agencies at other places in the Dominion: 34 Vic. ch. 5, sec 4.

The bank may charge commission for discounting at one agency a bill drawn on another : 19-20 Vic. ch. 76, sec. 22.

The bank notes are to be made payable on demand in specie at the place where they are made : Section 24 ; and 34 Vic. ch. 5, sec. 55.

I come to the conclusion that the money was payable at Cobourg. I am not altogether prepared to say it was not payable in Montreal if a demand according to the terms of the deposit receipt (which I have not seen) were made at Montreal, and a sufficient time allowed to the head office to make the necessary enquiry at the branch office to ascertain if the money could be safely paid, and upon paying the proper charges occasioned by such communication and probably also the discount: *Co.* Litt. 210*b*, note (1).

A person having money at his credit at a branch bank could require the head office by order, bill, or otherwise, to transfer that credit to his account at the head office. The bank although having many places of business is yet the one body—the only debtor to a depositor. A customer having money in different branches has but the one debtor.

Garnett v. *McKewan*, L. R. 8 Ex. 10, shews that a customer having a credit in his favour at one branch, and having overdrawn his account at another, may have the sum at his credit transferred by the bank to the branch where he is a debtor, to balance it, and that the bank may do so without notice to him.

I feel there are some difficulties in dealing with deposits at one agency by the head office or by another agency.

In this case, on the death of William Irwin, where did the bank, his debtor, reside for the purpose of granting administration? Was it at Cobourg, or was it in Montreal?

Perhaps it may be said it was at either place, according to the election of the applicant for administration, for a person—and the defendants, I presume, in such a case may be treated in the like manner—may have more residences than one: *Walcot* v. *Botfield*, Kay 534, 18 Jur. 570; *Maltass* v. *Maltass*, 1 Rob. Eccl. R. 67. Although, for the purpose of the administration of his personal estate, a person cannot have two domicils: *Forbes* v. *Forbes*, Kay 341, 18 Jur. 642; *Crookenden* v. *Fuller*, 5 Jur. N. S. 1222.

The case of *Re Brown* v. *London & N. W. R. W. Co.*, 4 B. & S. 326, shews the bank may be said to dwell at its principal place of business. That must more especially be its place of abode or residence, although it may for many purposes have more residences than one.

I think, if the money were at the Cobourg branch, administration might have been taken out there; but that does not shew if administration could by the law of the Province of Quebec be taken out there, that an administration granted there would not also be sufficient.

If an ordinary debtor had two residences, one here and another in Quebec, where would administration, in order to

reach the debt—and assuming administration could be taken out in Quebec—be properly grantable? In my opinion, at either of his residences.

Here practically administration was taken out in Quebec, for their law permits the administration granted in another country to be as operative in Quebec as it was in the country in which it was issued. I come, therefore, to the conclusion that, for the purpose of this administration, the debtor did, at the death of Wm. Irwin, reside in Montreal; and as the defendants chose to consider the money as payable there, and they did pay it there, that the money became payable there, and was rightly paid under the Ballina grant of administration, and it was not necessary to have an Ontario administration.

The fourth question is answered by what has been said to the third question. The fifth question raises the enquiry as to the value of the notice served—that is, were the defendants bound to pay the money on the demand under the Ballina administration notwithstanding the notice served upon them? I think they were. They might not have done so perhaps, but might have taken indemnity for not doing it, in which case all would have been right. Yet they could not refuse to pay when the administrator made the demand upon them to pay. As I think the Ballina grant was a valid one, although obtained by the rankest fraud, and as it was not revoked by the Dublin grant, and certainly the defendants knew nothing of the revocation, if it were revoked, and as the proceedings were quite regular, and were the judicial act of a Court, which conferred upon James Gardiner the character of the personal representative of the depositor, the defendants could not, unless at their own risk, avoid the payment of the money. It was their duty to pay it. They were bound to do it, and the payment was lawfully and rightfully made.

The sixth question is, whether the defendants paid the money in good faith to a person who was an ostensible creditor?

That question is raised under articles 1144 and 1145 of the L. C. Code Civile, which declare that "Payment must be

made to the creditor or to some one having his authority or authorized by a court of justice or by law to receive it for him. Payment made to a person who has no authority to receive it is valid if the creditor have ratified the payment or profited by it. Payment made in good faith to the ostensible creditor is valid although it be afterwards established that he is not the rightful creditor."

I have no hesitation in saying that the payment in question "was made in good faith to the ostensible creditor;" and that the defendants are entitled to the protection of that provision so far as the payment was made rightfully in Montreal where the Code Civile applies. And it was rightly paid there although the administrator could not, as I have said, have compelled it to be made there. Independently of that provision, I think the defendants are absolved by the payment they did make.

The seventh question is also just disposed of.

The eighth question has been disposed of already.

It becomes unnecessary to answer the ninth question.

I can now answer the principal question. Was the payment made by the defendants at Montreal under the Ballina administration a good payment? I think it was, for the reasons before given.

I cannot avoid saying that it is a misfortune that administration can be granted in a case of this kind upon the oath of the interested party under which the most grevious injustice may be done, as it certainly has in this case, and yet no security taken for the protection of those who have been injured. There is surely some amendment of the law wanted to cure this dangerous state of things. I trust, if James Gardiner is not able to indemnify the losing party, that his colleagues and conspirators in this knavery and fraud may be found able to do it for him.

We are obliged to discharge the rule.

HARRISON, C. J., and MORRISON, J., concurred.

Rule discharged.

Regina v. The Corporation of the County of Haldimand.

River separating townships—Bridge over—Obligation to repair.

A bridge had been built in 1857, by a Joint Stock Company formed under the 16 Vic. ch. 190, at the village of York, about half way between Caledonia and Cayuga, over the Grand River which separates the two townships of Seneca and Oneida in the county of Haldimand. In 1862 it was destroyed by a storm, rebuilt in 1863, and kept in repair since by tolls collected upon it. In 1873 it became out of repair and dangerous, and the Secretary of the company wrote to the county council that the company abandoned the bridge. The county having been indicted for not repairing it.

Held, that they were not liable; for 1. By the statute then in force, 35 Vic. ch. 33, sec. 9, the abandonment by the company could only be by law; and 2. There having been no bridge there before, there was nothing for the county council to resume, and they had refused to assume this bridge, which had never become a public highway by ddication, tolls having been imposed upon it.

Semble, that a bridge like this, the only work owned by the company, may be abandoned as well as a road.

Quære, whether the county could not be obliged to establish a bridge across the river at some convenient place between Caledonia and Cayuga, there being none for that distance, about eleven miles.

Indictment moved by *certiorari* into this Court. It alleged that there had been for fifteen years last past before the finding of the inquisition on the 30th of September, 1873, and there yet is, a public bridge across the Grand River, which stream separates the township of Seneca from the township of Oneida in the county of Haldimand, which public bridge had been used by and for all the liege subjects, &c., and that parts of the bridge were and had been from the 1st of September, 1872, and yet were very ruinous, broken, and in great decay for want of due reparation and amendment, so that the liege subjects of our Lady the Queen could not go, &c., on, over and across the said public bridge as they ought and were wont to do, without great damage, &c., of their lives and loss of their goods, to the great damage and common nuisance of all Her Majesty's liege subjects, &c.; and that the corporation of the county of Haldimand the said public bridge so in decay ought to repair and amend, when and so often as it should be necessary.

The defendants pleaded:—

1. Not guilty.

2. The bridge was not a public bridge, and the corporation ought not to amend and repair the same.

Issue.

The cause was tried before Burton, J., at the Spring Assizes, 1875, held at the town of Simcoe.

The material evidence was as follows:

Adam A. Davis, Reeve of Seneca, said:—A bridge was first constructed where the present one now is in 1857 or 1858. That bridge was carried away in 1862, and in the fall of that year the present superstructure was put up. It remained for thirteen years. It was pretty safe till the ice this spring injured it. Since the finding of the indictment, repairs have been made by public subscriptions. The village of York, where the bridge is, contains a population of about three hundred. The bridge is immediately opposite the third concession line. The traffic over the bridge is next in importance to that over the Caledonia bridge. There was a ferry before the bridge was built. At the time of the indictment being found, and in March before it, the bridge was considered dangerous, and it was condemned by the county engineer. The Joint Stock Company abandoned the taking of tolls and notified the county council of it. The county council refused to have anything to do with it. There are no bridges over rivers separating two townships, except this one, in the county. The township of Seneca gave $500, and Oneida $300. They first gave a loan of $500, but afterwards, on $200 being repaid, they gave the remainder as a gift.

Seneca has a population of about 3000 and Oneida about the same. The county took tolls upon the bridges. The second bridge was also put up by an incorporated company which charged tolls.

There is a road running through Seneca to the bridge, and then to Oneida as far as the river road, some 500 or 600 yards from the river. The road never has been opened as a county road. It is about five miles from Caledonia

bridge to York. and about six miles from York to Cayuga' where there is a bridge. The next bridge is at Dunnville sixteen miles from Cayuga. The township grants that were made were in aid of the last bridge; no subsequent grants by townships. The bridge is about the centre of the townships. The roads on each side are not boundary roads. The company was only a bridge company, not a road company. The township of Seneca repairs the road to the bridge. The county used to repair the piece between the bridge and the river road as an approach to the bridge. The Haldimand Navigation Company claims some rights to the river. The county had to build the Caledonia bridge. It had to get the consent of the Navigation Company to build it without a swing.

N. H. Wickett said: A bridge at York is a great necessity. There is a great want of one between Cayuga and Caledonia, there is so much travel.

The instrument of Association of the Joint Stock Company under the 16 Vic. ch. 190, dated the 11th of September, 1856, for the building of this bridge was put in. The company was called The York Bridge Company. The capital was $4000, to be held in 200 shares of $20 each. The stock was on the 4th of August, 1857, increased according to the statute to $5,200. On the 20th December, 1861, the county council of Haldimand passed a by-law regulating the tolls to be charged for the use of the Cayuga, Indiana, and York bridges.

On the 6th of March, 1873, N. H. Wickett, Secretary to the Company, wrote to the county council: "I am instructed by the directors of the Seneca and Oneida Bridge Company to place before you the following statement: Sixteen years ago a bridge was built across the Grand River at York by a company called the Seneca and Oneida Bridge Company, at a cost of about $9000. Four years after it was completed, in the summer of 1862, during a fearful storm of wind, the whole superstructure of the bridge, over 600 feet in length, was carried off the piers and dashed to pieces in the river, the stockholders losing of course their entire investments. An

appeal was again made to the inhabitants in the neighbourhood for funds to construct another, a hearty response was given by individuals as well as by the townships of Seneca and Oneida, and in 1863 another bridge was built, which has been kept in repair ever since by the tolls collected thereon. This bridge is now getting the worse of the wear, the timbers are fast decaying and at present it is hardly safe for a heavy load to pass over. There has never been a cent realized by any stockholder, and the tolls will no longer keep it in a safe condition. Under these circumstances I have been instructed to place the matter before the county council asking them to take such steps as they may think best, towards putting said bridge in a safe state for travel. We as a company abandon the work altogether and leave it a question between you and the public, believing that is the duty of the county council to erect and maintain all such bridges between two townships within the county."

On the 3rd June, 1873, it was moved in the county council by Mr. Davis, seconded by Mr. Lynch, that whereas by clause 410 of the Act respecting Municipal Institutions it is expressly declared that county councils have exclusive jurisdiction over all the bridges across streams separating two townships within the county. And whereas by clause 413 of the same Act it is declared that county councils shall erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county. And whereas it is necessary for the public convenience that the bridge crossing the Grand River at York between the townships of Seneca and Oneida should be maintained where it is, and that for the convenience of the public a bridge should be erected at Indiana. Be it therefore resolved, that the council do at once proceed to repair the bridge at York and erect a bridge at Indiana, and that the clerk be and is hereby instructed to advertise for tenders, accompanied with plans, for the said Indiana bridge, and that the reeves of Oneida, Caledonia, North Cayuga, Cayuga village, with the mover and

seconder, be a committee to have the necessary repairs made to the York bridge; and further, that said committee report thereon at the next meeting of this council.

The motion was negatived.

Moved by Mr. Davis, seconded by Mr. Lynch, that the council grant to the townships of Oneida and Seneca the sum of one thousand dollars to repair the bridge at York, between the said townships, and the reeves of Seneca and Oneida be a committee to expend the same and report thereon at the next meeting of the council, and also that the warden issue his check for the said sum in favour of the said committee, on their certificate that the work has been completed—which, being submitted, was lost.

Moved by Mr. Davis, seconded by Mr. Scott, that whereas doubt having arisen in the minds of members of this council as to the responsibility of the council to maintain the bridge crossing the river at York, be it therefore resolved: That the warden be and he is hereby authorized to procure the written opinion of some leading counsel, say R. A. Harrison, Q. C., on the question, and present the same at the next sitting of the council—which, being submitted, was lost.

On the 26th February, 1875, it was moved by Mr. Davis, seconded by Mr. Smart, that whereas an indictment is now pending against the county for not repairing the bridge crossing the Grand River between the townships of Seneca and Oneida, at the village of York, and whereas a difference of opinion exists as to the liability of the county for such repairs, be it therefore resolved: That the warden be and he is hereby authorized to submit the question of such liability to the Hon. the Attorney-General of this Province, and that the council be guided by his opinion. Lost.

The case was argued at considerable length by the learned counsel at the trial, but the learned Judge was of opinion there was no case to go to the jury, and he directed a verdict to be found for the defendants, with leave to the prosecutor to move to enter the verdict for the Crown if the Court should be of opinion the facts would sustain it.

In Easter term, May 19, 1875, *J. R. Martin* obtained a rule calling on the defendants to shew cause why a new trial should not be had, or a verdict entered for the Crown upon the leave reserved, upon the law and evidence.

In Hilary term, February 12, 1876, *F. Osler* shewed cause. The prosecutor contends that because this bridge was one over a river separating two townships in the same county, these defendants in whose county it was, are, by sections 409-413 of the Municipal Act, 1873, bound to repair it. The defendants' answer is, that as this was a bridge built many years ago, and maintained by a Joint Stock Company under the statute, the defendants are not bound to maintain it, because the company have failed to repair it; nor are they bound to adopt it, because the company may choose to abandon it. The defendants have never accepted the bridge, and they do not wish to be burdened with it. They have expressly refused to adopt it or to have anything whatever to do with it. The company had no right, nor have they the power to abandon the work they constructed, unless by by-law, and there has been no by-law : 35 Vic. ch. 33, sec. 5, sub-sec. 4, O., as amended by 37 Vic. ch. 24, sec. 2, O. The Municipal Act does not compel the county in such a case to assume and maintain such a bridge. The county should be allowed to judge of the propriety and expediency for the public interest in erecting their bridges. They may not think the site of this one a desirable locality, and if they are required to adopt this one and complete it, the expense will be very great, and they will be called upon to put up some others across the same river. This river is now vested in a company, who have special rights over it, and whose rights would be invaded by the defendants if they were to put up a bridge without the license of such company. The rights of that company are secured to them by the 31 Vic. ch. 65, O., and 34 Vic. ch. 57, O. He referred to *Kinnear and the Corporation of the County of Haldimand*, 30 U. C. R. 398 ; *Regina* v. *Brown*, 13 C. P. 356 ; *Re Wescott and the Corporation of the County of Peterborough*, 33 U. C. R. 280 ; *The Corporation of Wel-*

lington v. *Wilson*, 14 C. P. 299; *O'Connor* v. *The Township of Otonabee*, 35 U. C. R. 73; *Regina* v. *Hunt*, 16 C. P. 145; *Hacking* v. *The Corporation of the County of Perth*, 35 U. C. R. 460; *Rex* v. *Stoughton*, 2 Wms. Saund. (ed. 1871), 462, 479, 480; *Harrold* v. *The Corporation of the County of Simcoe*, 16 C. P. 43; S. C., in appeal, 18 C. P. 9; *Regina* v. *The Corporation of the Village of York-ville*, 22 C. P. 431. In the last case the defendants were bound to maintain the bridge, which was at first put up by a private person, because the village had adopted it as part of their highway and streets and had done repairs upon it for several years before they were proceeded against for not repairing it. But that case is in every respect quite unlike the present one.

S. Richards, Q. C., supported the rule. This company to build the bridge was organized as a road company, and it may be doubtful if a company to build a road could build a bridge. Public roads came up to the river on each side of it, at the place where the ends of the bridge were placed, long before the bridge was built. There is now no bridge over the river between Caledonia and Cayuga, a distance of eleven or twelve miles; and York, where this bridge stood, is about half way between these two places. The company gave notice of abandonment of the bridge to the county in March, 1873. The 35 Vic. ch. 33, O., requires the abandonment to be by law. The 37 Vic. ch. 24, O., requires notice to be given to the county. The abandonment of this bridge was before the latter Act was passed. Consol. Stat. U. C. ch. 49, sec. 3, applies to the right to build a bridge by itself. He also referred to several other sections as applicable here. Tolls can be taken when a certain number of miles of road are made; that is different as to bridges: sec. 78. By the 29 Vic. ch. 36, sec. 9, a company had power by by-law to abandon a part of their road; by the 35 Vic. ch. 33, sec. 9, the company can by by-law abandon the whole of its road. The prosecutor does not understand the defendants dispute their liability if this bridge be considered as a road, and if the abandonment by the company

had been made or declared by by-law. Consol. Stat. U. C. ch. 49, sec. 7, makes a bridge a part of the highway. Abandoning the road will therefore be and is an abandonment of the bridge. *Angell & Ames* on Corporations, 10th ed., discusses in secs. 772, 773 the abandonment of roads, &c. See also *Currier* v. *Ottawa Gas Co.*, 18 C. P. 202. If the company had not the power to act as a corporation under the statute, the bridge must be treated as if it had been built by a number of private persons, and inasmuch as the public have used the road, it has become a public road by user, and the public are bound to repair it. It has been and is a public convenience: *Rex* v. *Inhabitants of Leake*, 5 B. & Ad. 469; *Corporation of Wellington* v. *Wilson*, 14 C. P. 304; *Rex* v. *Inhabitants of the West Riding of Yorkshire*, 2 East 342; *Rex* v. *Inhabitants of the West Riding of York*, 7 East 588; *Shelford* on Highways, 3rd ed., 9. The river company have no interest in the river or over it, and they cannot hinder a swing bridge, such as this one was, from being put up: *Dimes* v. *Petley*, 15 Q. B. 276.

March 17, 1876. WILSON, J.—The first thing to be done is, to ascertain what legislation if any, we have on the subject. The Municipal Act, 1873, sec. 410, enacts as applicable to this case, that "the county council shall have exclusive jurisdiction * * over all bridges across streams separating two townships in the county." And, by sec. 413, that "It shall be the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities (other than in the case of a city or separated town), within the county."

That part of section 410 which gives the county jurisdiction "over every road or bridge dividing different townships" does not apply because the bridge did not and does not *divide* different townships—it connected and connects them—it goes longitudinally from one to the other—and is not a line parallel to the township limits; and because according to the best opinion I could form I was of opinion, and am still, that the last enactment could only be recon-

ciled with some of the other provisions of the Act by holding that the county could not be compelled to exercise jurisdiction "over every road or bridge dividing different townships" unless the county assumed such jurisdiction by by-law: *O'Connor* v. *Township of Otonabee*, 35 U. C. R. 73.

The power which the county council has "over all bridges across streams separating two townships in the county," and the duty cast upon it "to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities (except in the case of a city or separated town) within the county" is all the legislation on the subject contained in the Municipal Acts, excepting that such work when performed must be by by-law: sec. 440 and sub-secs.

It is plainly the duty of county corporations to give effect to these enactments, and that responsibility the defendants do not deny.

There may be some difficulty in determining what bridges over rivers forming or crossing boundary lines between these two townships within the same county, the county are to erect and maintain. They cannot be required to put up a bridge in continuation of every concessional road allowance which comes to the river. That would be unreasonable, extravagant, and unnecessary. But it may be said they should not decline to put up a bridge over such a river as the Grand River for the whole length of two townships which it divides. That must depend upon the population of the neighbourhood and the public interests and requirements to be served. It would be rash to attempt to lay down a rule in such a case. Each particular case must be governed by its own special facts and circumstances. Bridges might be built at shorter distances one from the other over a small body of water than over a wide expanse of water, or over streams with low banks than over those with high banks. They might be more easily built over many streams than over the Thames, and more easily over the Thames than over the Grand River, and more easily over the Grand River than over the Ottawa.

Then again the locality and public requirements must all be considered. A bridge might be necessary in every street over a stream in a city, while one or two bridges over the like streams might answer a whole township.

From the facts appearing here, that there is no bridge over the river from Caledonia to Cayuga a distance of about eleven or twelve miles—that the villages of Indiana and York lie between these two bridges—that York has a population of about 300, and has a drill shed, show grounds, plaster mills, &c—that Seneca and Oneida have each a population of about 3000—that there was a ferry there before the bridge was built, and that a bridge was in fact put up about 1857, and maintained until it has lately got so ruinous as to be dangerous for travel—are all circumstances which shew a strong and reasonable claim to have a bridge somewhere between Caledonia and Cayuga, and probably that it should be at York which is about halfway between these two places.

It may be there are not sufficient facts shewn yet to enable a correct opinion to be formed, for the expense of this work and the ability of the defendants to do the work would also have to be considered.

All these are matters of mere general speculation. They apply more especially to a motion for a *mandamus* to compel the erection of a bridge over some convenient part of the river between Caledonia and Cayuga, as in the case of *Kinnear and the Corporation of the County of Haldimand*, 30 U. C. R. 398, and not to this present proceeding, which is one to compel the defendants by force of law to adopt this bridge and put it into sufficient repair for the public use as a portion of the highway, which they are bound to maintain.

By Consol. Stat. U. C. ch. 49, sec. 3, the Joint Stock Company "may construct in, along, or over any public road or highway or allowance for road, or on, along, or over any other land, a plank, macadamized or gravelled road, not less than two miles in length, and also any bridges, piers, or wharves, connected therewith."

The head of the municipality must be notified of such

intended work, and the municipality may prohibit or vary it: sec. 10.

The municipality having jurisdiction within the locality in which the work is constructed may hold stock in the company: sec. 63; or may lend moneys to it: sec. 65; or may purchase the stock of the company or part of it: sec. 68; or may sell any such work it has purchased: sec. 69.

If the company or municipality suffers any portion of their road to be out of repair, the tolls may be stopped: secs. 85, 86, 88; 35 Vic. ch. 33, sec. 1, sec. 2, sub-secs. 1, 2, 3, and secs. 3, 4, 5, 6, 7, O.; 29 Vic. ch. 36, sec. 6; 37 Vic. ch. 24, sec. 4, O.

The company may by by-law abandon any portion of their road, and after such abandonment the municipal council of any municipality within which such road or any part thereof lies, may assume such abandoned portion of the road lying within the municipality, and may have and exercise the same jurisdiction over the same, and be liable to the same duties as such council has or is subject to in respect of public roads within its jurisdiction: 29 Vic. ch. 36, sec. 9. And by 35 Vic. ch. 33, sec. 9, O., the company may abandon the whole of their road, such abandonment, by 37 Vic. ch. 24, sec. 2, O., to be signified by the head or president of such company by a notice in writing, delivered to the council of the county wherein such road or any part thereof lies; and until the delivery of such notice, as aforesaid, such company shall be liable in any civil suit for damages arising from the unsafe condition of such road. The county council, within which such road or any part thereof lies, may assume such abandoned portion of such road lying within the municipality, 35 Vic. ch. 33, sec. 9, O., and may assume such road in the manner and enjoy all the rights and be subject to all the responsibilities and liabilities, as provided in sub-section 3 of the 5th section of this Act: "And failing such action on the part of such county council, such road shall then be subject to the same jurisdiction for the control and repair thereof, as provided in sub-section 4 of section 5 of this

Act; but no such company shall be entitled to *abandon* any intermediate portion of their road," &c.

The fourth sub-section of section 5 of 35 Vic. ch. 33, is: "And in case the municipal council of such county does not think fit and proper, within the period of one month next after the expiration of the aforesaid nine months, to assume, by by-law, such road for the purpose of repairing the same and levying tolls thereon, the municipal council of any municipality which would, under the provisions of the Municipal Institutions Act in force in the Province of Ontario, be required to maintain and keep such road in repair as a common and public highway, shall be liable to the same duties as such municipal council has, or is subject to, in respect to the public roads within its jurisdiction."

This sub-section, in the reference to the nine months, relates to the third sub-section, which requires that the repairs settled by arbitrators to be done by the company, shall be done by the company within nine months after the award and if the repairs are not so done the company shall forfeit all right to the road, and the municipal council of the county through which such road or any part of it passes may enter upon and take possession of it and exercise the like jurisdiction over it as the company could have done, and shall put it in repair.

By section 12 it is enacted: "The several sections of this Act which provide for the resumption of roads by the municipalities, the removal of material and buildings from the same and of intermediate portions thereof, shall not be held to apply to roads constructed by any company or corporation on private property, or acquired from any company from private owners."

These are the provisions which apply to the case.

The general enactments are that Joint Stock Companies may improve public roads and build bridges, and may buy from the owners all necessary land for the laying out of roads.

In these companies municipalities interested as before mentioned may take stock, or they may lend money to the company, and they may buy the whole or part of the stock of the company.

The companies may also abandon in the manner prescribed the whole or a part of their road. If a company abandons the whole line the county council within which the road or part of it lies may assume it. Or if the company within the period of nine months allowed by the arbitrators to do the repairs fail to do them, their right to the road is forfeited, and the county council may enter upon and take possession of it and do the repairs.

In the cases just mentioned of municipal bodies acquiring the roads by purchase, or by assumption of them on forfeiture by the company to repair, or by abandonment of the road, the municipal corporation takes the rights of the company—35 Vic. ch. 33 sec. 9 and sec. 5 sub-sec. 3—and continues, as I understand, to carry on the road under the provisions of the Joint Stock Companies Act.

But if the county council does not think fit, within one month after the forfeiture by the company by not repairing, or upon abandonment by the company of the work, to assume it, the council of any municipality which would, under the Municipal Act, be required to maintain such road as a common and public highway shall be liable to do it, as they are liable to keep in repair the other public roads within their jurisdiction.

If the municipal body does not *assume* the road or work, they *resume*, that is there is cast upon them again by 35 Vic. ch. 33 sec. 12, O., only their own original roads, and no more, for they cannot be compelled to take roads constructed by the company on private property or acquired by the company from private owners. The 29 Vic. ch. 36 sec. 9, when part of the road is abandoned, will have to be construed so as to correspond with these general provisions on the like subject.

In this particular case, if the abandonment have been rightly made by the company, and if a bridge may be abandoned as a road may be, and if the bridge is one which at this spot the municipal body could have been compelled to erect and maintain under the Municipal Act, it will follow in this case, as the bridge is over a river forming

or crossing a boundary line between the townships of Seneca and Oneida which are in the same county, that the proper body to repair this bridge is the county of Haldimand, because it is the one (all the above circumstances concurring) which under the Municipal Act is required to maintain it and keep it in repair as a common and public highway within its jurisdiction: 35 Vic. ch. 33 sec. 9, and sec. 5 sub-sec. 4.

But I am of opinion that the notice in writing which was given on the 6th of March, 1873, by the directors of the company to the county council of their abandonment of the bridge was not a legal abandonment of it, inasmuch as the only mode appointed by the statute at that time to constitute a valid abandonment was by the 35 Vic. ch. 33 sec. 9, and this notice cannot in any sense be called a by-law.

A notice in writing is now sufficient by the 37 Vic. ch. 24 sec. 2, O.; but then, again, if there be a head or president of the company, as there may be, Consol. Stat. U. C. ch. 49 sec. 43, the notice is not *signified* by him, and is, I am disposed to think, insufficient for that cause.

I think a bridge such as this, the only work which the company has, may be abandoned as well as a road. But then arises the difficulty, there was no bridge or highway there before. There is nothing therefore for the county council to *resume*, and they will not voluntarily *assume* it. It cannot be said the county was ever bound to erect a bridge on the site of the present one, or in or at any particular spot thereabout.

The most that can be said is that the county ought to erect a bridge somewhere between Caledonia and Cayuga, and at the most advantageous point between these two places, for the common convenience of the public and the inhabitants, unless the expense would be too great in putting it up at that particular place. In such case, another site, reasonably convenient for the public and the residents, might be selected, so as to bring the expenditure properly, under the circumstances, within the ability of the county to meet it.

And while I say the defendants cannot be convicted upon this indictment, because the bridge is not a public highway or public bridge, and never has been, nor, as the law now stands upon the present state of facts, ever can be, I by no means say that the defendants may not be obliged to establish a bridge across this river at some place between Caledonia and Cayuga convenient for the public and the inhabitants of these and the adjoining townships, and that probably it may be found that the site of the present bridge may be as judiciously chosen for the purpose as any other locality.

There were some cases referred to for the purpose of shewing that this bridge has been beneficial to, and has been used by the public, and the county is bound to maintain it, although it has never accepted it. There are such cases, but they apply only to ways *dedicated* to the public: *Rex* v. *The Inhabitants of Leake*, 5 B. & Ad. 469; *Regina* v. *Lordsmere*, 15 Q. B. 689; *Rex* v. *The Inhabitants of Lancashire*, 2 B. & Ad. 813; and so as to a bridge. And the fact that a company allowed the public to use their bridge on payment of a toll would exclude the inference of a dedication: *Grand Surrey Canal Co.* v. *Hall*, 1 M. & G. 392, per Tindal, C. J., at p. 404: "If the matter were to rest on what had taken place since 1834," (putting on a toll) "it could not be said that there had been a dedication to the public."

There was nothing to have prevented the company from removing their bridge at any time they pleased. It was their own private property at the time it was in use.

A bridge of this kind is not one which is or can be said to be dedicated at all, and there can be no common law liability or statutory duty under our system cast upon anybody to repair such a bridge as a public way, unless it has been used by the public under the right of a dedication.

If this bridge had been thrown open by the company to the public, and it had continued to be used generally without charge by the company, and the user of it was a public advantage, it is very probable a strong argument might

have been raised against the county as to their liability to keep it in repair, but there has been nothing of that kind, and the case of *Regina* v. *The Corporation of the Village of Yorkville,* 22 C. P. 431, does not apply. The reading and interpretation of our own special legislation determines this question.

The rule must be discharged.

MORRISON, J., concurred.

HARRISON, C. J., took no part in the judgment, having been engaged in the case while at the bar.

Rule discharged.

TOPONCE v. ROBERT MARTIN.

Promissory notes—Illegal considerations—Compounding a felony—Foreign law.

To an action on five promissory notes the defence was that the plaintiff, in Utah territory in the United States, had charged defendant with felony (receiving cattle stolen from the plaintiff), and that in consideration of the plaintiff consenting to withdraw and abstain from prosecuting the charge, defendant agreed to make the notes; and that in pursuance of such agreement the notes were made, and the plaintiff abstained from prosecuting the charge

Upon the evidence, set out in the case, the Court, differing from the learned Judge before whom the case was tried without a jury, *Held*, that an agreement was made that, in consideration of the notes being given, the criminal proceedings which the plaintiff had threatened to take against the defendant should not be prosecuted; and that the plaintiff therefore could not recover on the notes.

Semble, that a mere threat to prosecute for a criminal offence unless a note be given for money the debtor actually owes, will not avoid the note.

It is of no consequence whether a charge has been formally preferred or not; it is equally an offence to compound in either case.

Held, also, no difference between our own law and that of Utah having being shewn, that the effect of compounding a felony must be presumed to be the same in both countries.

Per Wilson, J.—The plaintiff, if not prevented from recovering on the defence set up, would not have been bound first to take criminal proceedings in Utah for the felony, before suing here on the notes, the suspension of the civil remedy being a matter of purely local policy.

DECLARATION on five promissory notes, and on the common counts. The notes were as follows:

A.—For $1,000, made by defendant and Richard Martin, payable to the plaintiff at 60 days.

B.—For $500, made by the same parties and one O. S. Wright, payable to the plaintiff at 60 days.

C.—For $500, made by the defendant and Richard Martin, payable at 60 days to the order of James B. Singleton, who endorsed to Warren, Hussey & Co. or order, who endorsed to the plaintiff.

D.—For $500, made by the same parties, payable at 30 days, to James B. Singleton or order, who endorsed to Johnson & Hyndman or order, endorsed to the plaintiff.

E.—For $500, made by the same parties, payable at four months, to the order of James B. Singleton, who endorsed to Warren, Hussey & Co., who endorsed to the plaintiff.

They were all dated on the 19th of November, 1872, and they each bore interest at three per cent. per month until paid.

Pleas to each of the counts upon the notes: 1. Plaintiff not the lawful holder; 2. Fraud; 3. As to the first two notes, that, before their making, the plaintiff had charged the defendant with committing a felony, and that in consideration of the plaintiff consenting to withdraw the said charge and to abstain from prosecuting the same, the defendant agreed to make and deliver to the plaintiff the said respective promissory notes; and thereupon the defendant, in pursuance of the said agreement, made and delivered to the plaintiff the said two notes; and thereupon the plaintiff withdrew the said charge and abstained from prosecuting the same.

The like three pleas were pleaded to each of the other three notes—only charging that the composition of felony as to them, was with the payee of them, James B. Singleton; and that the endorsers from Singleton each held the notes without value and consideration; and another plea of the like nature, alleging that the endorsers held the notes with notice; and another plea of the like nature, alleging that the endorsers got the notes after they were due; and another plea that the notes were made to Singleton, as the consideration for the plaintiff who had charged the defendant with a felony withdrawing the same. Then all the endorsations were denied, and fraud pleaded in every form against each of the parties.

There were 37 pleas in all pleaded to the counts on the

notes, and the 38th plea was the general issue to the common counts.

Issue.

The cause was tried at Belleville, in the fall of 1875, before Patterson, J., without a jury. Much of the evidence was taken under a commission, executed in Utah Territory, U. S., and many objections were taken to its due execution, the principal one being, that the affidavit of due taking of the commission did not shew that the proper oaths were administered to the witnesses—the expression being, "an examination on oath was taken," not shewing that the witnesses were sworn before the commissioner according to the form endorsed. Evidence was received of Edward P. Benson, who was a notary, and was also Mayor of Corinne at the time of the taking of the commission, and who took the affidavit of the due taking of the commission by the person who swore it before him. It was then further objected that only the commissioner or his clerk could prove the due taking.

Leave was reserved to move on these objections.

The evidence taken under commission, so far as material, was as follows:

James B. Singleton, said: The defendant was introduced to me by the plaintiff; defendant said he wanted to borrow $2,000, for which he said he would give me a note signed by himself and his father. I said I was not well enough acquainted with them to lend him such a sum upon their own note, but if the plaintiff would endorse for them, I would let them have it; the plaintiff and defendant then left together. The plaintiff came afterwards to Mr. Ranschoff's store with four notes for $500 each, signed Richard Martin and Robert Martin, and plaintiff endorsed them. The three notes marked C D E, are three of the four notes to the best of my knowledge. I gave him a cheque for $2000. I afterwards left them at the bank for collection; I endorsed the notes; the endorsement on these notes is in my signature, to the best of my knowledge.

Cross-examined: I received the notes, as near as I can recollect, on the 19th November, 1872; the consideration

for the notes was the $2,000 I loaned; I do not know that defendant ever received the $2,000; I never saw the notes advertised; the notes were put to my credit in the bank; a few days before the first of the notes fell due, I met the plaintiff and told him of its becoming due; he said the Martins had left the country, and he would settle the notes, which he did; I think my check for $2,000 was drawn in plaintiff's favour.

George Butterburgh, said: I was in the employ of J. W. Kerr & Co., and about the 19th November, 1872, plaintiff and defendant were having a settlement for cattle that had been sold by the plaintiff to defendant and Richard Martin, in the summer of 1870 and 1871; they did so by giving certain notes to James B. Singleton; and I think there were some notes given to the plaintiff direct; I think the notes A B C D E are the notes I speak of; I am positive one of them is, because there is an endorsement on it for two head of cattle, I made myself on the note D; I was present when they signed the notes.

Cross-examined: Plaintiff was a member of the firm of J. W. Kerr & Co., in the years 1870, 1871, 1872; he dealt in cattle besides what he did as a partner of the firm; he so dealt with one William M. Johns in cattle outside of the firm; I made a memorandum of the cattle the Martins got from plaintiff and Johns; I think they were charged to plaintiff, and he became responsible to Johns for them; I kept a portion of plaintiff's books of account on the 19th November, 1872; N. S. Ranschoff kept a portion of them; I was away a good deal of the time and then Mr. Ranschoff kept them: I do know that defendant and Richard Martin received cattle from the plaintiff in 1870; I think 216 head, and in 1871, from 40 to 60 head; and to the best of my knowledge these notes were given for these cattle; all the cattle that were delivered in 1870, were from the two herds of J. W. Kerr & Co., and the plaintiff and Johns; those delivered in 1871, were cattle plaintiff got from Mr. Creighton; two notes were signed at that time; one for $1000, and four for $500 each; the endorsement on note D was for two cattle, $120; they were branded an open A, which plaintiff

got from Martin; they were sold the 10th February, 1873, for $120; at that time plaintiff had a bill of sale from Martin for that brand; it was supposed there were from 40 to 60 head, which plaintiff was to take and dispose of and give credit on the notes for the amount they brought; and these were the only two that could be found. The bill of sale was given about the time the notes were given.

Jesse M. Langsdorf said: I was a clerk in the employ of Warren, Hussey & Co. in 1873, up to October of that year, at Corrine. The notes C and E were paid to Warren, Hussey & Co.—C on 22nd January, 1873, E on 29th July, 1873—by the plaintiff. Warren, Hussey & Co. endorsed them to him when he paid them. They had been left at the bank only for collection.

Cross-examination.—I was in the employ of Hussey, Dahler & Co. in November, 1872, before Warren, Hussey & Co. succeeded them, and commenced on 21st December, 1872; they were endorsed to the bank by Singleton for collection; I wrote the endorsement under the words, "without recourse"; I put these words through caution; I understood there was to be some litigation about the notes.

Alexander Toponce (plaintiff) said: In November, 1872, I was dealing in cattle and horses, and in freighting; I got notes A and B at their date; I have always had possession of B; I discounted A at the bank for about thirty days, and I paid it, when it again became my property; notes C, D, and E have always been my property, since I paid them as endorser; there is still another note which is lost; I paid it to Singleton; it was for $500, with interest; I have ever since then been the lawful holder of the notes; notes A and B were given to me for cattle; some of them were sold to Robert Martin and Richard Martin; some were driven off from the range; others were purchased by Richard Martin and Robert Martin from parties who had stolen them; Robert and Richard Martin knew they were my cattle; in our final settlement they gave me notes A and B in payment; notes C, D, E, and another note, I became the owner of by paying them as endorser;

Robert Martin asked me if I would endorse notes to the amount of $2,000 to Singleton; I told him I would if he would secure them, which they did by making out two bills of sale—one of them to secure notes A and B, the other to secure the four Singleton notes of $500 each; they were given on the 18th of November, 1872, and purported to convey a lot of cattle branded with an open A, of which I have secured three head—two of which I credited on one of the notes, $120; the other one I sold to Mr. Haydon. in 1874, for $28, and had to pay $8 for getting it; the other bill of sale purports to convey a lot of property, horses, &c., I don't recollect what, which I have never been able to get possession of. [Exhibits C and H shewn him]; I am scarcely able to read writing at all, and cannot identify them by the writing; exhibit H, from the brand with open A on it, is the one to secure me for notes A and B; G was to secure me as endorser on the Singleton notes; I did not accuse Robert Martin of having stolen my cattle from me; I did not agree not to prosecute him on consideration of his signing the notes; I endorsed the Singleton notes for the benefit of the parties.

Cross-examination: The whole sum was $4,500; Mr. Martin paid me in cash, $1,000; the Singleton notes, which Singleton cashed, for $2,000; and notes A and B for $1,500; I think I delivered over two hundred cattle to the Martins in 1870 and 1871; I think the Martins said it was forty-five or fifty-five head of cattle of mine that had been stolen that they settled for; I only know the number from their own statement; I paid Johns for twenty-five head for his share; my means of knowledge of the stolen cattle is from the statement of the defendant; he said he purchased ten head of cattle branded with diamond J, known as John's and Topence's cattle; he said he knew they were my cattle when he purchased them, but he refused to give me the parties' names he purchased them from, and that he gave $100 or $125 for them; that he had coralled the ten, and he had had great trouble in doing it, as it was by moonlight, and the train whistled coming in from

the east, and the cattle broke; he said they lost one or two; that he killed five of them; he said he was willing to pay for the cattle he had bought that had been stolen from me; Butterbough had a statement of all the evidence about the cattle; he read it to the Martins; when he concluded, Robert Martin threw up his hands and exclaimed, "we are ruined; they have caught us," and that they had got the cattle and were willing to pay for them. I don't know. I don't think I intimated to them that they were liable to prosecution criminally for having received stolen cattle, knowing them to have been stolen. I think I told them if they did not pay for the cattle I would sue them for the price. Don't recollect of saying anything in regard to a criminal prosecution. I did not think I had sufficient evidence in my possession to convict them. I did not in any manner threaten them. I used no violence or threat in any shape; I simply told them I must have pay for my cattle. I did not tell O. S. Wright to tell them that if they would not settle the matter I would make it hot for them, and that I would pay Wright one-third of all the money that could be made out of the Martins in such settlement. If he told them so, he did it without any authority from me. The Martins claimed that they had from 25 to 45 head of cattle at the time; they would range from $37.50 to $75 a head. He also said they would be worth from $20 to $30 a head according to age and quality.

For the defence.

Richard Martin said: In 1872 plaintiff charged us for stealing cattle. I told him we never stole any. He wanted to charge us $4,500. My son Robert then gave him $1,000 and the balance in notes, which I told him he was blackmailing us out of. The plaintiff Butterbough and O. S. Wright sent for us; they read letters from Charles Finn and Ben Johnson, and Wright said that they had driven cattle to our corall and sold them to Robert and myself, and if we did not pay for them he would take proceedings against us. They kept us locked up till we said we would settle for the cattle, and made threats. We promised to

settle with them if they would let us go. Robert gave plaintiff $1,000 in cash. We signed the notes. He asked for security. I said we had 64 head of A steers and other cattle, and we gave them bills of sale on the house, corall, and on the cattle. The plaintiff, Butterbough, Wright, and my son and I were present when the notes and bills of sale were made and signed, and Mr. Hyndman sat at the desk writing. We never got any consideration for the notes. I heard plaintiff accuse the defendant of stealing cattle, or buying cattle that had been stolen from him, and threatening to prosecute him if he did not settle for them. The notes were given to stay the proceedings. I advertised the notes. [Copy of paper put in; advertisement 19th January, 1873.] We said nothing to plaintiff when the notes were given.

Cross-examination: We bought cattle from plaintiff in 1870 and 1871, and paid him for them. We bought no cattle from him in 1872. He charged us with stealing cattle that year, and we settled with him not to take proceedings against us. Plaintiff claimed for 80 head of cattle, and said he would make us pay him $4,500 for them. He had to give an account of that money to the company.

Robert Martin, the defendant, was examined at Nisi Prius. He stated generally that the cattle he bought from plaintiff in 1870 and 1871 had been paid for, and that the cattle claimed by plaintiff he had lost in 1872, which he says were stated to be 45, were those that were settled for by the notes and by the $1,000 in cash, in all $4,500, and that he and his father by arrangement with the plaintiff met at the Board of Trade room in Corinne, and others were then present with the plaintiff; that the door was locked; and that the defendant and his father were told by plaintiff he had taken them like a gentleman and peaceably, for he did not want to disgrace them; that he wanted us to settle and he had evidence enough to convict us; and if we did not settle we would all go to the penitentiary; plaintiff said if he got $2000 in money, he would take notes for the rest; we paid $1,000 and gave notes for the

balance; for the 5 head of cattle plaintiff wanted security and I gave it on the A cattle and my father on the corall and house; the 5 cattle Wright had driven into our corall and he was paid $35 a head for them; no admission made of any other cattle but the 5 head we had got belonging to plaintiff; he did not know Singleton till that day, and had never spoken to him; plaintiff said there were 45 head of his cattle missing, and he was going to make us pay for them. We left Utah ten days after the notes were given, but not for the note transaction; there would have been nothing wrong if Wright had not put the 5 head of cattle into our corall on a dark night; it was in November, 1870; witness knew they were driven in, but did not know they were stolen. He knew they were innocent, and gave the notes because they did not want to have a lot of swearing done against them. He added—I know Finn; he had nothing to do with the cattle; it was before he came to the country; we were not afraid of him; I suppose there were some other little items; he did not explain in the letter when he was in gaol; the other little items were, I suppose, Wright and he drove some cattle in the corall; and we killed them, and issued them out to the Indians; we did not pay for them; we had no right to pay for them; I do not know that they were the plaintiff's cattle; plaintiff said he could get them all after us; we generally always paid a little something for the cattle, mostly to Wright; I don't know whose cattle they were, or how many head there were; Finn did not stay long enough to drive many in; Wright drove in till I said I would not receive any more; I don't know that I had received $4,500 worth; plaintiff said he would not take less; don't know we offered any less sum; my father and I met plaintiff after leaving the room, and said that sooner than be taken up on a criminal charge we would give the notes; I said it was a thievish outrage; I explained to plaintiff there were only 5 head of cattle while he was charging 45, and the 45 head of cattle would be worth $40 a piece.

The case was adjourned to Toronto. On the 2nd June, 1875, it was argued by the counsel.

Armour, Q. C., for the defendant, said he relied on the pleas raising the defence that the notes were given in consequence of the plaintiff withdrawing a charge of stealing cattle, and on the pleas of fraud. The $1000 paid was more than sufficient to pay for the 5 head he admitted to have had.

H. Cameron, Q. C., contra, maintained there was a difference between the giving of notes where there was value for them, but the remedy was suspended until the criminal charge was prosecuted, and the giving of a note without any value, the only consideration being the compounding of a felony; that in this case there was full value received by the defendant for the notes. The law of Utah the defendant has not proved.

The learned Judge said, "The question is, whether the pleas are proved. I cannot find for the defendant upon the pleas of fraud. Whatever was done was understood by defendant and his father. It is clear from the whole evidence that they were not deceived by plaintiff by any concealment of facts which are shewn to have been known to them. The question must turn on the consideration for the notes. Was there any consideration other than that stated in the pleas? If there was any other consideration the plaintiff must succeed. If there was no other consideration I must find for the defendant. I am of opinion the pleas (of compounding felony) are not proved. There is no evidence of any agreement to withdraw any charge, or not to prosecute defendant. I do not think there was any charge of felony such as the plea alleges. Taking the defendant's own evidence it merely shews that plaintiff asserting, and as I gather from all the evidence asserting truly, that a number of his cattle had been stolen, charged the defendant and his father with having had them, or with having stolen them. He did not take any proceedings or make any charge in the sense of laying an information, but insisted that the Martins should pay for the cattle, and threatened criminal proceedings if they did not pay him $4,500, which was the price he insisted on being paid to

him. The plaintiff and defendant differ in their statements of the transaction of the giving of the notes, one particular in which they differ being that the defendant admits he admitted the receipt of five head of cattle and says that the plaintiff asserted that he had lost forty-five out of one herd of cattle, and insisted on being paid by the Martins $4,500 for the 45 head of cattle; while the plaintiff's statement is, that he had lost 80 out of the herd in question; that the defendant admitted he had 45 head of the stolen cattle, and that the plaintiff insisted the Martins must have had all the 80 and must pay $4,500 for them. I am satisfied the plaintiff threatened criminal proceedings, though he denies it, and the Martins in order to avoid them gave the notes, but gave them not on any agreement not to be prosecuted nor without valuable consideration. The evidence does not enable me to say with certainty what the amount of the consideration really received by the Martins was. I see, however, no reason to doubt that whether the Martins had or had not anything to do directly with stealing the plaintiff's cattle, they received, either from Wright or otherwise, cattle of the plaintiff's which were stolen; and while I am not satisfied they received in good faith or bought as a fair business transaction, there appears from defendant's evidence a suspicious association with other persons besides Wright; and the effect of all the evidence touching the affair of the giving of the notes is, that the Martins, on paying the $1,000 cash, and on giving the notes, and on giving the security, gave the money and the notes for the price of the cattle, which the plaintiff claimed to be worth $4,500, and which the Martins agreed to pay for and were content to value at that sum. I do not believe the evidence of the Martins that they did not know Singleton. I believe that the Singleton notes were made as the plaintiff and Singleton say, for the purpose of being cashed by Singleton, to whom the Martins, or the defendant, at all events, had been introduced by the plaintiff. I do not doubt that Singleton could have recovered against the defendant on the notes. I do not consider the question

how far the plaintiff, taking as endorser of Singleton, can avail himself of Singleton's position, as I find that on the present pleadings and evidence the defence is not established as against the plaintiff himself.

Verdict for plaintiff, $3,000 principal; interest at 3 per cent. per month for 2½ years and 20 days on $2,760; in all....	$5,760 Am'n Cy.
Less payment of 10th February, 1873, $120, and 2 years and 4 months' interest, $101.....	221
Balance as of 12th June, 1875	$5,539 U. S. Cy."

In Trinity term, February 22, 1875, *Armour*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved at the trial, on the ground that the evidence taken under the commission was not properly receivable, for the reasons urged at the trial of the cause; or why a new trial should not be had, for the improper reception of the evidence of Mr. Johnston, to support the reception of the said evidence, or why a verdict should not be entered for the defendant pursuant to the Law Reform Act.

In Hilary term, Feb. 16, 1876, *H. Cameron*, Q.C., shewed cause. There were several objections taken to the reception of the evidence given under the commission, which the learned Judge overruled. The chief question is, whether the evidence sustains the pleas of compounding the felony stated to have been charged by the plaintiff against the defendant. In order to avoid the notes which were given, and which were given for value to which the plaintiff was entitled, it must be shewn that there was an agreement made between the parties that the felony should not be prosecuted: *Ward* v. *Lloyd*, 6 M. & G. 785. He referred also to *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Bayley* v. *Williams*, 4 Giff. 638; *Wells* v. *Abrahams*, L. R. 7 Q. B. 554; *Walsh* v. *Nattrass*, 19 C. P. 453; *Livingstone* v. *Massey*, 23 U. C. R. 156; *Collins* v. *Blantern*, 1 Smith's L. C., 7th ed., 369. The

rule against compounding a felony is one of public policy in the country where the alleged felony took place, and it is not to be considered when the alleged felony took place in a foreign country. The defendant should have shewn that stealing cattle, or buying stolen cattle, knowing them to have been stolen, was a felony in the Territory of Utah, where all this transaction took place, and that the laws of Utah forbid the compounding of a felony: *Regina* v. *Hennessy*, 35 U. C. R. 603. There is a difference between the case of a person having a just claim against another for property stolen and taking from such person a note for its value, and that of a person having no such claim, but compelling that other to give a note in order to avoid being prosecuted for stealing. The plaintiff never agreed not to prosecute; he insisted on getting the notes in payment for his cattle, which he charged the defendant and his father with having improperly got and used. The cases of *Milligan* v. *Grand Trunk R. W. Co.* 16 C. P. 191; *Frank* v. *Carson*, 15 C. P. 135; *Simms* v. *Henderson*, 11 Q. B. 1015, apply to the objections taken to the commission. The objections were rightly overruled. If there was anything in them, the evidence of Mr. Johnson, who was examined at the trial and who was present nearly the whole time while the evidence was being taken in Utah, removed them all.

Armour, Q. C., supported the rule. The learned Judge seems to have thought it was necessary a charge should have been made before some authority against the defendant for this offence, or that proceedings of some kind should have been taken against him for it, so as to impeach the notes which he gave in settlement of the offence he was accused of: But see *Clubb* v. *Hutson*, 18 C. B. N. S. 414. In *Williams* v. *Bayley*, L. R. 1 H. L. 200, a mere threat of proceedings, without any promise to forbear, was held sufficient to avoid the note. The plaintiff, at the most, lost about 45 cattle, which he valued at $45 a piece, and he blackmailed the defendant and his father to the extent of $4,500, or $100 a head, for the cattle. If the stealing of

cattle, or the receiving stolen cattle with a guilty knowledge of their having been stolen, is deemed to be an offence in Utah, the stifling of the prosecution of such offence will invalidate any security given for such a purpose; and it will be presumed here to have been such an offence, unless it be shewn to the contrary, that the law is different there from what it is here. He referred to *Huber* v. *Steiner*, 2 Bing. N C. 202; *Harris* v. *Quine*, L. R. 4 Q. B. 653; *Robertson* v. *Caldwell*, 31 U. C. R. 402; *Hope* v. *Caldwell*, 21 C. P. 241; *Ex parte Critchley*, 3 D. & L. 527, S. C. 10 Jur. 112; *Osbaldiston* v. *Simpson*, 13 Sim. 513. The case of *Beard* v. *Steele*, 34 U. C. R. 43, answers the principal objection which was taken to the commission, namely, that its due taking was sworn before a notary public. But the commission is still imperfect, even although Johnson's evidence could cure the defects. He says he was present and saw the witnesses, all but the plaintiff, sworn, but he does not say that the evidence was taken down correctly. But the facts which the commissioner should certify, or which should be duly returned by and with the commission, cannot be proved by the evidence of a person who happened to be present when the commission was being executed.

March 17, 1876. WILSON, J.—We are of opinion the notes were given by the defendant and his father under a threat of criminal proceedings being taken against them for their receiving the plaintiff's stolen cattle, knowing them to have been stolen, unless they did give the notes.

The pleas of compounding this alleged felony, as to the notes mentioned in the first and second counts, state the arrangement to have been made between the plaintiff and the defendant. These pleas state that the plaintiff had charged the defendant with committing a felony, and that in consideration of the plaintiff consenting to withdraw the said charge, and to abstain from prosecuting the same, the defendant agreed to make and deliver to the plaintiff the said notes in each of the pleas mentioned; and thereupon,

&c. The 16th plea to the third note C, the 26th plea to the fourth note (D), and the 37th plea to the fifth note (E), are each precisely like the pleas to the first and second notes (A and B), excepting that those to the three last notes state that the notes respectively were to be made and delivered by the defendant to James B. Singleton, from whom the plaintiff derived title, not immediately but through the endorsations of others who had no title to them.

The learned Judge who tried the cause was of opinion that the plaintiff threatened to take criminal proceedings; and, having so threatened, that the defendant in order to avoid them gave the notes; but that he did not give them on any agreement not to be prosecuted. And he found also that the notes were not made without a valuable consideration.

In the case of *Ward* v. *Lloyd*, 6 M. & G. 785, a warrant of attorney given under a threat to prosecute for a criminal offence was not set aside by the Court, because there was no agreement to forbear from prosecutng.

In *Ex parte Critchley*, 10 Jur. 112, the warrant of attorney was set aside because criminal proceedings were pending. and they were abandoned upon the giving of the security,

In *Williams* v. *Bayley*, L. R. 1 H. L. 200, a security given by the father for a claim made on his son for the amount of certain forged bills upon a threat to prosecute the son, was held to be undue pressure brought to bear upon the father, and to be equivalent to a compounding of felony, or to the stifling of a prosecution for a criminal offence, and that the father was entitled to be relieved from the security he had given.

I presume that compounding a felony is the taking of some reward for forbearing to prosecute, or making some bargain by which something is to be done for not prosecuting—the staying of such prosecution being the subject, or the principal or special subject, of the arrangement.

It is of no consequence whether a charge has been formally preferred before a magistrate or not; it is equally

an offence to compound in such a case after an information has been laid: *Regina* v. *Best*, 9 C. & P. 368.

Stifling a prosecution may not be the same thing, accurately speaking, as compounding a felony. The Lord Chancellor, in *Williams* v. *Bayley*, L. R. 1 H. L. 200, 211, said that the matter there was, in his opinion, not properly the compounding of a felony, but the stifling of a prosecution. See also *Wallace* v. *Hardacre*, 1 Camp. 45.

The pleas I shall take as sufficient in that respect, although the plaintiff did not receive any reward or benefit by way of gain when he took the notes in question, assuming them to have represented his own *bonâ fide* claim against the defendant.

I think from the facts an almost irresistible conclusion may well be drawn that the meaning of what was said and done in this case, although not more than a threat was used to procure the notes was, that an agreement was made, and was intended to have been made, that the plaintiff should not prosecute upon the notes being given to him.

The evidence certainly was, that the defendant would be prosecuted if he did not give the notes. What is that but saying if he did give the notes he would not be prosecuted?

What was said and done in *Williams* v. *Bayley* was much less than that, yet it was said by the Lord Chancellor: "If you do, we will not prosecute; if you do not, we will. That is the plain interpretation of what passed."

The inference of a forbearance to prosecute having been agreed to is so very strong, that if the learned Judge had drawn it I should not have differed from him. The only question is, whether, as he has formed the contrary opinion, I can coincide with him?

My leaning is, of course, to accept of the finding, even if I may doubt of its correctness. The present finding I am unable to agree with, because the evidence shews, although not in express words, yet in effect and almost conclusively, that an agreement was made between the parties that if the defendant gave the notes he would not be prosecuted for the charge which was made against him.

The giving of the notes under these circumstances, although the defendant owed every farthing of the money, cannot be sustained.

There can be no reasonable doubt that if the defendant had been told in so many words that he would be prosecuted whether he gave the notes or not, that he would not have given them. The hope, the inducement, held out to him was, "give the notes and you will not be prosecuted," and the threat was, "refuse to give them and you will be prosecuted."

There is a great difference between the giving of a security when the person giving it does not owe the money exacted from him under the pressure of a threat of this kind, and the giving of it when the person does owe the money. In the latter case the agreement would have to be more satisfactorily proved. In the former case there could be hardly room for doubt that the forbearance to prosecute must have been agreed upon, for there could be no other consideration. The matter to be proved would be alike in each case, but the degree of proof to sustain the one might differ, according to the circumstances, from that which would be required to sustain the other.

There may also be a difference between proceedings taken in equity to avoid a security given from or by reason of undue pressure of a threat of this nature, and defeating it by a plea of composition of felony in an action at law.

In *Ward* v. *Lloyd*, 6 M. & G. 785, the warrant of attorney was not set aside, although it was given in consequence of a threat to prosecute. If that is undue pressure, the Court would not give effect to the application.

In *Williams* v. *Bayley*, L. R. 1 H. L. 200, the application was to rescind the agreement entered into, because the threat to prosecute if it were not given implied the promise not to prosecute if it were given, and the application was successful. And I infer from that case that the threat alone, to prosecute if the security were not given, would have been considered undue pressure.

In *Chowne* v. *Baylis*, 8 Jur. N. S. 1028, S. C. 31 Beav. 351. A clerk of the Commercial Bank of London robbed the

company of very large sums of money, and on discovery of it, the directors charged him with it; he acknowledged it, and said he would do what he could to make it good as far as possible; and he thereupon assigned policies on his life. No promise was made to him to forego the prosecution, nor any other inducement was held out to him to make the assignment; and he was afterwards prosecuted and convicted. And it was held there was a valid debt as a consideration for the assignment; and that the assignment was good in law.

There is a good deal also to shew that the sum of $4,500 could not rightly be made up.

The defendant admitted only 45 or 55 head of cattle, as the plaintiff himself said; and according to Butterburgh, the defendant had only from 40 to 60 head of cattle for which they gave the notes. The plaintiff's valuation was from $37.50 to $75 a head.

Robert Martin says, the plaintiff claimed for 45 head of cattle, and these were the cattle that were settled for.

If the number be stated at 50 that Robert Martin settled for, and the price be averaged at $60, that would make the total sum $3,000, which should have been paid. If so, the plaintiff got $1,500 more than his just claim.

The defendant also says he told the plaintiff he had got only five head of cattle, while he, the plaintiff, was charging for 45 cattle; and that they (the defendant said) were worth only $40 a piece.

If that be the number and price, then the sum would be only $1,800. There is not the slightest reason to believe that the defendant ever voluntarily agreed to pay for more, according to the plaintiff's own shewing, than for 50 cattle; and it is plain he never voluntarily agreed to pay the large sum of $4,500 for them. The presumption is, of course, increased in such a case that the additional sum was given to stifle the prosecution.

The plaintiff says he settled with Johns, a kind of partner of his in the cattle that were said to have been stolen, by allowing him 25 head for his share, which would, by

the plaintiff's own act, fix the number at 50; and it was these cattle he and Johns had between them, he says, that were settled for; but he does not tell us the price he paid Johns for his share. There is no reason to believe he allowed him half of the $4,500 or anything like it.

I am of opinion, on the whole case, that the plaintiff took advantage of the position the Martins were in, to make them pay a larger price or for a greater number of cattle than he had any just claim for; and that the inference from the evidence is, that there was a bargain made between them, that in consideration of the Martins giving the notes for $3,500 and paying the $1,000 in cash, which they did do, they would not be prosecuted for the charge he made against them.

If, therefore, the like rule is to be applied in this case when the whole transaction took place at the residence of the parties in the territory of Utah, in the United States, which would be applied if it had all taken place in this country, the defendants will be entitled to prevail. The offence, if any, took place in Utah, and it is not against the policy of our own domestic law that such a matter happening there should be compounded for there.

But when we adjudicate upon foreign law, we adopt for the occasion that law as part of our own law, and we may act upon the law of the foreign country being the same as our own in this respect, unless it be averred and shewn to be different, and it is for the person setting up such difference to establish it: *Benham* v. *Earl of Mornington*, 3 C. B. 133; *Smith* v. *Gould*, 4 Moore's P. C. 21, per Lord Campbell, at p. 26; *Cope* v. *Doherty*, 2 DeG. & J. 614; *Vanquelin* v. *Bonard*, 15 C. B. N. S. 341; *Regina* v. *Hennessy*, 35 U. C. R. 603, and the cases there cited.

A contract, if void or illegal by the law of the place in which it was made, is generally held to be void and illegal everywhere: *Story's* Conflict of Laws, 7th ed., sec. 243; *Hope* v. *Hope*, 3 Jur. N. S. 454; *Bristow* v. *Sequeville*, 5 Ex. 275.

I am of opinion the defendant's pleas are sufficient. The defendant relies on the law being the same here as it is in

Utah respecting the compounding of felony, and as that is the presumption it would be for the plaintiff to reply the foreign law if it be different from our law, or in this case he may shew it to be so by evidence.

An assault committed in a foreign country was laid generally, without naming the foreign country; *Scott* v. *Seymour*, 1 H. & C. 219. See *Doulson* v. *Matthews*, 4 T. R. 503.

I am of opinion that if the notes had not been impeached on the ground that they have been, the plaintiff could have sued upon them here before he had taken criminal proceedings in Utah, or even although he were never to institute such proceedings there, because the suspension of the civil remedy here would be quite useless in order to compel the plaintiff to vindicate the dignity of the foreign law; that would be and is a matter of purely local policy: *Scott* v. *Lord Seymour*, 1 H. & C. 219, 230.

I have not considered the objections taken to the commission by the defendant. The principal one has been disposed of, as was admitted, by *Beard* v. *Steele*, 34 U. C. R 43. I think it would be found there is no force in any of them.

For the reasons given I think the rule should be made absolute to enter a nonsuit for the defendant on the counts upon the notes. But I do not see why the plaintiff may not, if he is so advised, maintain an action of trover or trespass, or for goods sold and delivered, in order to recover the price of the cattle it may be proved he took, or admitted he took of the plaintiff's cattle. In that case the defendant can plead as a set-off the payment of the $1000 already paid to the plaintiff.

HARRISON, C. J., and MORRISON, J., concurred.

Rule absolute.

The Queen v. The Port Perry and Port Whitby Railway Company.

Misdemeanor—New trial—Obstructing navigable river—Evidence—Judge's charge.

In no case of misdemeanor, after verdict of acquittal, will a new trial be granted, on the ground that the verdict is against evidence or the weight of evidence. In cases of *non-feasance*, such as non-repair of a highway, a new trial may be ordered on the ground of misdirection, or improper reception or rejection of evidence; but in cases of misfeasance. such as obstruction of a highway, it is doubtful if a new trial should be granted in any case.

Where the defendants were indicted for obstructing a navigable river by the erection of a wharf, and there was no evidence that the part covered by the wharf had ever been navigated by vessels of any size, but it was shewn only that the prosecutor was prevented by it from landing there with his skiff, and the wharf was proved not to interfere with the navigation: *Held*, that the jury were rightly directed that on this evidence the only verdict which could be rendered was not guilty.

Such a direction is not so much a direction on the law as a strong observation on the evidence, which may properly be made in a proper case without being open to the charge of misdirection.

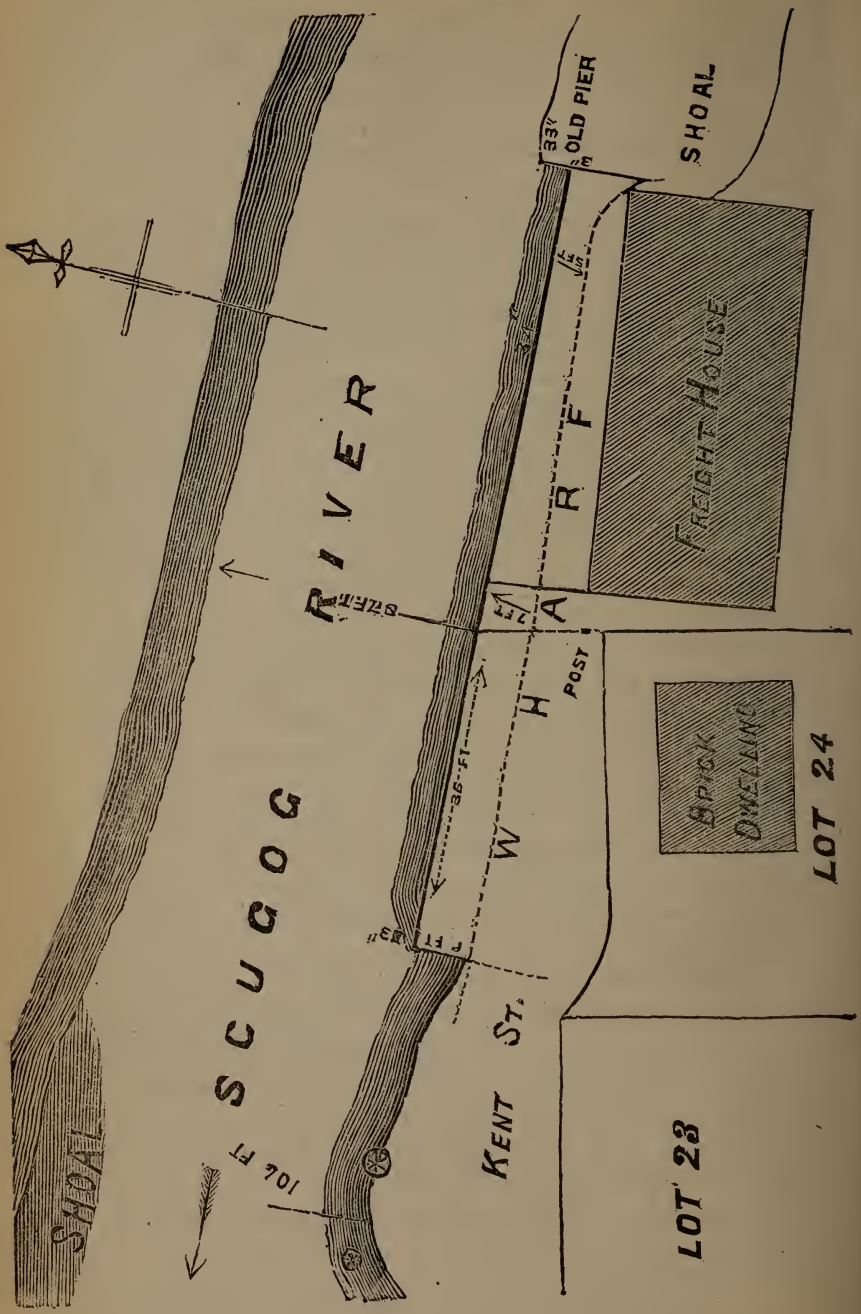
Indictment for a nuisance found at the General Sessions of the Peace, in and for the County of Victoria, which was afterwards removed into this Court by writ of *certiorari*.

The indictment charged that the defendants, on or about the 15th of September, 1873, and before and since, did obstruct a certain highway, the river Scugog, being a navigable river, &c., and running between lake Scugog and Sturgeon lake, in the county of Victoria, and unlawfully and injuriously did put and place a wharf and warehouse, and did then and on the said other days and times then unlawfully and injuriously prevent and suffer the said wharf and storehouse respectively to be and remain, in and upon the said Queen's common highway aforesaid, *ad commune nocumentum*.

Plea, Not guilty. Issue.

The cause was tried before Gwynne, J., and a jury, at the Lindsay Fall Assizes for 1875.

The sketch on the next page shews the premises in question.


SCUGOG RIVER
SHOAL
OLD PIER
SHOAL
FREIGHT HOUSE
WHARF
POST
KENT ST.
BRICK DWELLING
LOT 24
LOT 23
100 FT

At the trial the following facts appeared in evidence:—

Elias R. Powell, the private prosecutor, said he lived on the east of Kent street, on lot 24. Defendants owned the lot east of and adjoining the prosecutor's premises. The defendants filled in a portion of the river in front of his lot. They erected a wharf on the river in front of Kent street. It is situate in front of the defendants' as well as the prosecutor's land. They have a store on the lot. It is partly on the river. The river runs under the storehouse. The river is not filled in there. The depth of the water opposite to the corner of the prosecutor's lot is six feet five inches, and at the west end of the wharf seven feet. It is three feet eight inches at the edge of the wharf opposite defendants' lot. The wharf extends forty feet in front of the prosecutor's lot. The prosecutor at one time had a boat house opposite the corner of his lot. He put it there to prevent the defendants building the wharf. Part of the boat house was on his own lot. The width of the wharf opposite prosecutor's land is ten feet. Steamboats come along side of the wharf. The river is navigable there by all kinds of river craft. The prosecutor knew the river since 1851, and proved that the river was navigated by steamboats ever since he knew it. The bank of the river is steep adjoining the wharf. The prosecutor forbid the defendants putting the wharf where they did. The contractor for the wharf destroyed the prosecutor's boat house. The obstruction prevented the prosecutor landing with a skiff at the place where the wharf is opposite to his lot. The lot is not as good for a private residence with as without the obstruction. Kent street lies between the prosecutor's lot and the waters of the river where the wharf is built. In spring freshets the water came up to the corner of the prosecutor's lot. The corner stake on such occasions was mostly under water. The prosecutor's lot is about three or four feet above the level of the river. There is a dam and lock on the river below the wharf. The river is now six or seven feet higher than it was before the lock and dam were built. No vessel

going up or down the river could navigate the river at the place where the wharf is built. A shoal juts out there further than the wharf. The bank west of the wharf heads out into the river.

George Crandell, who had navigated the river for 18 years, gave evidence at the trial. He never landed at the place where the wharf is before the wharf was built. He never had occasion to take a steamer to that place. He has a steamboat called the Ranger. It draws only two and a half feet of water. He swore that it would be more convenient for him to land at the wharf than at the bank if the wharf were not there. He found not the slightest difficulty in navigating the river by reason of the wharf. It is not built in the navigable channel of the river. It protects a boat if another is passing. He swore that he anticipated no obstruction whatever to the navigation of the river by reason of the wharf being there.

The learned Judge told the jury that upon the evidence the only verdict which could be rendered was not guilty.

The jury accordingly rendered a verdict of not guilty.

During Michaelmas term, November 17, 1875, *Hector Cameron*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict should not be set aside, and a new trial had between the parties, on the ground of misdirection of the learned Judge who tried the cause, in ruling that no nuisance by defendants or obstruction of a navigable river had been proved.

During Hilary term, February 19, 1876, *W. Mulock* shewed cause. There can be no indictment for a nuisance unless the obstruction be a material one: *Rex* v. *Russell*, 6 B. & C. 566, 603; *Regina* v. *Betts*, 16 Q. B. 1022; *Regina* v. *Randall*. C. & M. 496; *Regina* v. *Tindall*, 6 A. & E. 143. No such obstruction was shewn in this case, and the leaning of the Court, if any, should be towards the encouragement of trade and commerce: *Rex* v. *Ward*, 4 A. & E. 384.

Hector Cameron, Q. C., contra. The public are entitled to the use of the whole width of the highway: *Regina* v.

United Kingdom Electric Telegraph (Limited) Co., 3 F. & F. 73 ; *Harrison's* Mun. Man. 3rd ed. 402. The same rule exists in regard to rivers : 1 *Russell* on Crimes, 4th ed., 531; *Regina* v. *Tindall*, 6 A. & E. 143 ; *Rex* v. *Ward*, 4 A. & E. 384 ; *Hood* v. *The Commissioners of the Harbour of Toronto*, 34 U. C. R. 87 ; *Joliffe* v. *Wallasey Local Board*, L. R. 9 C. P. 62, 87, and in this case defendants do not pretend to have any right to build the wharf where they did : *Dimes* v. *Petley*, 15 Q. B. 256 ; *Eastern Counties R. W. Co.* v. *Dorling*, 5 C. B. N. S. 821. The Court clearly has power in such a case to grant a new trial : *Regina* v. *Chorley*, 12 Q. B. 515 ; *Regina* v. *Russell*, 3 E. & B. 942 ; 1 *Russell* on Crimes, 4th ed., 532.

March 17, 1876, HARRISON, C. J.—The first question is, as to the power of the Court, independently of a statute of some kind, to grant a new trial on an indictment for a misdemeanor *after a verdict of acquittal.*

The power, if any, is not on the authorities by any means free of doubt. "It is a well established rule, that where a man has been once indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence. * * * If he be thus indicted a second time he may plead *autrefois acquit*, and it will be a good bar to the second indictment ; and this plea is clearly founded on the principle, that no man shall be placed in peril of legal penalties more than once upon the same accusation—*nemo debet bis puniri pro uno delicto.*"—*Broom's* Legal Maxims, 5th ed., 347.

In *Rex* v. *Fenwick*, 1 Sid. 153, the defendants were indicted for perjury and acquitted. A new trial was moved on the ground that their acquittal had been procurd by the unlawful practices of Sir John Jackson, in whose behalf they had committed the alleged offence. The Court decided that in such a case there was no precedent for a new trial.

So it was held after verdict of acquittal on an information for assault and riot : *Rex* v. *Davis*, 1 Show. 336.

In *Rex* v. *The Parish of Silverton*, 1 Wils. 298, where the indictment was for not repairing a highway, and the verdict was for the defendants, the Court refused a new trial "for misdirection or overruling evidence at the trial," saying "This is a *criminal* case, and new trials are never allowed where defendant is acquitted in a *criminal* case." See further *Rex* v. *Praed*, 4 Burr. 2257.

But in *Rex* v. *The West Riding of Yorkshire*, 2 East 353, note *a*, where the inhabitants of a parish were indicted for not repairing a public carriage bridge, and there was a verdict for the defendants, the question of power was apparently not raised and a new trial was ordered.

In *Rex* v. *Reynell*, 6 East 315, where the indictment was for non-repair of the fences of a church yard, and a verdict for the defendant, counsel for the prosecution in moving for a new trial admitted "that he had not been able to find any instance where the Court had granted a new trial in case of misdemeanor where the verdict was for defendant," and also admitted that "in 24 Geo. II., the Court had refused to grant a new trial on an indictment against the inhabitants of a parish for non-repair of a road, where there had been an acquittal." And per Lord Ellenborough, at p. 316: "It is very clear that you may indict the defendant again if the fences have continued out of repair since the last indictment; and that is much better than for us in a case of such minor consequence to make a precedent of so much importance, which may affect other cases of misdemeanors." So the rule *nisi* was refused.

In *Rex* v. *Mann*, 4 M. & S. 337, where the indictment was for a nuisance in continuing a hut upon a highway, and a verdict for defendant, a rule *nisi* for a new trial on the ground that the verdict was against evidence, was refused. And per Lord Ellenborough, "Unless you can point out some distinction between the case of a nuisance and other criminal cases, the general rule is, that we do not grant a new trial upon an indictment for a misde-

meanor where a verdict has passed for the defendant upon the merits."

In *Rex* v. *The Inhabitants of Burbon*, 5 M. & S. 392, where the indictment was for non-repair of a highway, and after verdict for the defendants a motion was made for a new trial, on the ground that "the verdict was against all the evidence," and the Court was pressed because the prosecution was for the purpose of trying a civil right only, but the rule was refused. And per Lord Ellenborough, "In general, the rule is not to grant a new trial in a criminal proceeding after a verdict of not guilty. And inasmuch as the right will not be bound on the plea of not guilty, we do not think it would be proper to break into the general rule on the suggestion that the prosecution was merely intended to determine a civil right."

In 1 Starkie 517, note *a*, reference is apparently made to the same case, though not named, and the Court is reported as follows: "The general rule is, not to grant a new trial where a verdict has been found for the defendant; and although it is possible that the rule might be relaxed in some cases where such rights would otherwise be compromised, in this case there is no such necessity, since a new indictment may be found."

In *Rex* v. *The Inhabitants of Wandsworth*, 1 B. & Al. 63, where the indictment was for non-repair of a highway, and the verdict was for the defendants, the Court refused a rule *nisi* for a new trial, but "permitted *Gurney*, the counsel, to take a rule for staying the entry of the judgment upon the verdict given at the trial," which rule, under the special circumstances of the case, was after argument made absolute, although Lord Ellenborough in giving judgment said, p. 65, "My objection to making the rule absolute is, that the Court will thereby be doing indirectly that which, if they did directly, would be contrary to the established practice of the Court, acted upon in a variety of cases; that is, they will in effect be granting a new trial in a criminal case, where the defendant has been acquitted."

Abbott, J., in delivering judgment said, p. 66, "This is a question in which the public are interested; and as there are circumstances in the case that require further investigation, I think it is both convenient and just that the prosecutor should have an opportunity of presenting this case to another jury, without the prejudice of a judgment against him."

In *Rex* v. *The Inhabitants of Chigwell*, 1 B. & Al. 67, note *a*, where the indictment was for non-repairing a road, the Court hesitated about drawing the last case into a precedent, and after consultation with the Judge who tried the indictment refused a rule *nisi* to stay the entry of judgment.

In *Rex* v. *Sutton*, 5 B. & Ad. 52, where the indictment was for non-repair of a public bridge and verdict for defendant, the Court granted a rule *nisi* for a new trial on the grounds of misdirection and refusal to admit evidence, but, after argument, instead of making the rule absolute, followed *Rex* v. *Inhabitants of Wandsworth*, 1 B. & A. 63, by suspending the entry of judgment.

And per Denman, C. J., p. 57, "Upon consideration of all the points, * * we are not disposed at present to make the precedent of granting a new trial."

In *Regina* v. *Leigh et al.*, 10 A. & E. 398, where the indictment was for non-repair of sea walls, after verdict for the defendants, the Court made absolute a rule to stay the entry of judgment moved on the ground of misdirection and rejection of evidence.

In *Regina* v. *Chorley et al.*, 12 Q. B. 515, where the indictment was for obstructing a public footway, after a verdict for the defendant, a rule *nisi* was obtained to stay the judgment, in order that a fresh indictment might be preferred.

In delivering judgment, Lord Denman inadvertently, speaks of the rule as a rule for a new trial moved on the ground of misdirection, and the improper reception of evidence, and without at all discussing or deciding the powers of the Court in a such a case to grant a new trial, made absolute the rule for a new trial.

In *Regina* v. *Inhabitants of Cricklade, St. Sampson*, 3 E. & B. 947, note *b*, where the indictment, which contained several counts, was for non-repair of a highway after verdict for defendants the Court made the rule absolute for a new trial on the ground of misdirection as to some of the counts, Lord Denman saying "that a precedent had been established in *Regina* v. *Chorley*, 12 Q. B. 515."

In *Regina* v. *Russell*, 3 E. & B. 942, where the indictment was for obstructing the navigation, after verdict for defendant a rule *nisi* was granted for a new trial on the ground of misdirection, and the weight of evidence, and after argument was discharged. But the case is important because of some expressions of opinion it contains. Lord Campbell ,during the argument of counsel, said, p. 944, "A roundabout practice used to prevail, of staying judgment where it was considered that there had been misdirection. But is not the direct mode the more convenient one?" And again, p. 945: "The direct mode at least appears to be the best when the question is substantially as to a civil right."

In delivering judgment he said, p. 949: "I am of opinion that this rule should be discharged. * * * The ground of my decision is, that this is a criminal proceeding, and that the defendant ought not to be twice put in peril for the same cause. That rests upon a maxim of English law which will, I hope, always be held sacred. I, for my own part, reprobate the recent speculations as to the propriety of granting a new trial after acquittals for felony and murder. If there be an improper conviction it should be set aside; but I hope the same practice will never prevail in the case of an acquittal. When an indictment is instituted purely to raise a question of civil right, I agree with the doctrine which I find established. When there is no serious charge of an offence, it has been customary to interfere by suspending the judgment of acquittal; and I concur with Lord Denman and his colleagues (in *Regina The Inhabitants of Crickdale*) in holding that what it has been the practice to do indirectly should, when done,

be done directly. But where a real offence is charged, it would be creating a dangerous precedent to grant a new trial after acquittal. I do not know where we should stop. A nuisance may be created by exercising an unwholesome trade, by offensive noises, by numerous other means; and one can conceive this going so far as to produce manslaughter or even murder. Here a grave offence is charged; the defendant is accused of having obstructed the navigation; navigation is performed by both ships of war and merchantmen. The offence may be most serious. Then does the verdict determine a civil right? No; for after a verdict of not guilty, there may be to-morrow another indictment preferred by the same party, to which the present acquittal will be no bar. I think, therefore that this is not within the class of cases in which a new trial ought to be granted after acquittal."

The other Judges for other and similar reasons concurred, so the rule was discharged.

In *Regina* v. *Johnson*, 2 E. & E. 613, where the indictment was, for obstructing a highway, after verdict for defendant a rule *nisi* was granted for a new trial, on the ground that the verdict was against the weight of evidence, and afterwards discharged.

Wightman, J., said, p. 615: "I had, at first, very great doubts in this case, but the argument has now convinced me that, in making this rule absolute, we should be taking quite a new course. So far as I am aware, there is no case to be found in which a new trial has been granted, on the ground that the verdict was against the evidence, after a verdict for the defendant upon an indictment for obstruction of a highway. * * * It is far better to abide by the usual rule that, in a case to which, although a civil right is in question, many incidents of the criminal law attach, and in which a verdict does not bind the civil right, a new trial cannot be granted on the ground that the verdict is against the evidence.

Crompton, J., said, p. 616, "The charge of obstructing a highway is, moreover, of a more criminal nature than

that of the non-repair of a highway, which raises, chiefly, a mere civil question of liability or non-liability to repair. The cases cited were all cases of non-feasance, not of mis-feasance. If we were to grant a new trial in the case of mis-feasance, it is difficult to say where we should stop. We might in time entertain such applications in all cases of indictments for nuisances, assaults, and, perhaps, even felonies. It is a far better course to leave the prosecutor to prefer a fresh indictment."

The result of the authorities would appear to be,

1, That in no case of misdemeanour after verdict of acquittal will a new trial be granted on the ground that the verdict is against evidence or the weight of evidence.

2. That in cases of non-feasance, such as non-repair of a highway, a new trial may be ordered on the ground of mis-direction or improper reception or rejection of evidence.

3. That in cases of mis-feasance, such as obstruction of a highway, it is doubtful if a new trial should be granted in any case. In *Rex* v. *Mann*, 4 M. & S. 337, a new trial was refused. In *Rex* v. *horley*, 12 Q. B. 515, a new trial was ordered by inadvertence. In *Regina* v. *Russell*, 3 E. & B. 942, a new trial was refused. In *Regina* v. *Johnson*, 2 E. & E. 613, a new trial was refused.

If there be the power to grant a new trial in cases of indictment for non-feasance, I fail to see why the power does not exist in cases of mis-feasance. In the latter class of cases there may be more reason than in the former to abstain from the exercise of the power.

The rule in the United States appears to be, not to grant a new trial in a criminal case after an acquittal: *The State* v. *Taylor*, 1 Hawks. N. C. 462; *The State* v. *Martin*, 3 Ib. 381; *The State* v. *Kanouse*, 1 Spencer 115; *The State* v. *Wright*, 3 Brevard S. C. 421; *The State* v. *Reily*, 2 Ib. p. 444; *The State* v. *Brown*, 16 Conn, 54; even where there has been what we would call misdirection: *The State* v. *Baker*, 19 Mis. 683.

There are reasons why the Court should have power to grant a new trial in the case of persons improperly con-

victed of crime, which do not apply to persons improperly acquitted. And yet, although for a time the Superior Courts of Law of this Province had power under 20 Vic., ch. 61, Consol. Stat. U. C. 113, to grant a new trial to a person convicted of treason, felony, or misdemeanor, upon any point of law or question of fact, in as ample a manner, as any person may apply to the Superior Courts for a new trial in a civil action, yet the Legislature of the Dominion has assumed to deprive the Courts of the power: 32–33 Vic. ch. 29, sec. 80. In the face of such legislation it ill becomes the Courts to exercise a jurisdiction of the kind invoked here, unless their right to do so is beyond doubt. It seems to me, from the perusal of the cases to which I have referred, that although in some cases attempts have been made to relax the old rule against granting a new trial where there is a verdict of acquittal, these attempts have not been either well founded or well followed.

The rule that a new trial shall not be granted in a criminal case after verdict of acquittal, is, either a rule of law or a rule of practice—if a rule of law, the Legislature is the proper authority to alter the rule—if a rule of practice the present does not appear to be a case in which the rule should be relaxed by the Court.

The indictment contains the usual allegation, that by reason of the obstruction the liege subjects of our Lady the Queen could not go, return, pass, repass, and navigate their boats, barges, and scows in, through, and along the Queen's common highway, as they ought, and were wont, and accustomed to do, to the great damage, &c.

There was no evidence that the part of the river covered by the alleged obstruction had been ever navigated by vessels of any size, or that it was navigable by vessels of any moderate size. The most that was shewn on this head was, that by reason of the wharf the prosecutor was prevented from landing with his skiff.

Mr. Crandall, the person most conversant with the navigation of the river, swore that it would be more convenient for him to land at the wharf than at the bank if the

wharf were not there, and that he found not the slightest difficulty in navigating the river by reason of the wharf.

It is not every obstruction in a river which is to be deemed a nuisance.

The question whether a particular obstruction is a nuisance or not is, according to Lord Hale, in *De Portibus Maris* 85; Lord Tenterden in *Rex* v. *Russell*, 6 B. & C. 566; Mr. Justice Wightman, in *Rex* v. *Randall*, 1 C. & M. 496; Lord Denman, in *Rex* v. *Ward*, 4 A. & E. 384; Lord Campbell, Mr. Justice Patteson and Mr. Justice Erle, in *Regina* v. *Betts*, 16 Q. B. 1022, a question of fact for the jury who are to say whether the erection is such an interferance with navigation as to constitute a nuisance.

If in *Rex* v. *Russell et al.*, 6 B. & C. 566, Mr. Justice Bayley had simply submitted to the jury the question whether the "staiths" were, in their opinion, such an interference with navigation as to constitute a nuisance, Lord Tenterden, who dissented from the judgment of the Court, would have been perfectly satisfied with the verdict.

The charge of Mr. Justice Bayley, to the effect that the jury were to acquit the defendants, if they thought that the abridgment of the right of passage occasioned by the erection of the staiths was for a public purpose and produced a public benefit, in the broad terms in which expressed, although upheld by the majority of the Court, cannot now be sustained.

In *Rex* v. *Ward*, 4 A. & E. 400, Lord Denman, speaking of *Rex* v. *Russell*, said, "A case, the authority of which has been much doubted, and is perhaps likely to be more so as it is further examined."

In *Jolliffe* v. *Wallasey Local Board*, L. R. 9 C. P. 88, Mr. Justice Denman, speaking of the same case, said, "I have always considered that that case was practically overruled by *Rex* v. *Ward*, 4 A. & E. 384."

In *Attorney-General* v. *Terry*, L. R. 9 Ch. 426, note, Sir G. Jessel, M. R., speaking of the same case, said, "In my opinion that case is not law, and it is right to say so in the clearest terms."

In *Rex* v. *Ward*, 4 A & E. 384, Sir William Follett, whose interest it was to support *Rex* v. *Russell*, so far as he could, thus speaks of it "The doctrine of *Rex* v. *Russell* need not come under discussion ; nor is there any conflict of authorities. Erections may be made in a harbour, below high water mark, and in places where vessels might perhaps have sailed ; and the question whether they are a nuisance or not will depend on this,—whether upon the whole they produce public benefit, not giving to the terms 'public benefit,' too extended a sense, but applying them to the public frequenting the port."

In *Attorney General* v. *Terry*, already referred to, the Master of the Rolls accepted the statement of Sir William Follett as "a correct statement of the law."

Testing the present case by such a rule, no jury could on the evidence in this case properly find the wharf in question to be a nuisance.

In *Rex* v. *Tindall*, 6 A. & E. 143, where the indictment was for a nuisance in erecting and continuing piles and planking in the harbour, and thereby obstructing it and rendering it less secure, and the verdict was, that in some extreme cases, it rendered less secure, it was held that the defendants were entitled to be acquitted.

In *Regina* v. *Betts*, 16 Q. B. 1022, where the indictment was for a nuisance in building a bridge on a navigable river, on the finding of the jury that the bridge did not obstruct the navigation it was held that the defendants were entitled to be acquitted.

Although there be an obstruction in fact, yet if it do not materially interfere with navigation, defendants must be acquitted. This was expressly so held in *Regina* v. *Russell*, 3 E. & B. 942, where the indictment was for erecting a stone wall of great length and height, to wit, of the length of 200 yards and of the height of three feet. The case was tried before Mr. Justice Williams. He asked the jury whether they thought the erection would prove "a material nuisance," in which case they were to find a verdict of guilty, but told them if they thought the

nuisance was so slight, rare and uncertain that the defendant ought not to be made criminally liable for it; they should acquit him. The jury saying that they considered the erection "although a nuisance was not sufficiently so to render the defendant criminally liable," the Judge directed an acquittal. The charge though not "felicitously expressed," was upheld. See further, *People* v. *Rensellaer and Saratoga R. W. Co.*, 15 Wend. 113; *Delaware and Hudson Canal Co.* v. *Moore*, 2 Hun N. Y. 43; *Dutton* v. *Strong*, 1 Black., U. S., 31; *Mississippi & Missouri R. W. Co.* v. *Ward*, 2 Black, U. S., 485, 494; *Wisconsin River Improvement Co.* v. *Lyons*, 30 Wis. 61; *St. Paul & Pacific R. W. Co.* v. *Shurmeir*, 7 Wall. 272; *Sherlock* v. *Bainbridge*, 13 Am. 302; *Clark* v. *Peckham*, 14 Am. 654.

The verdict of not guilty here was a proper one on the evidence. The objection to the verdict, however, is not that it is against law or evidence, but that the learned Judge misdirected the jury, in ruling that no nuisance by defendants or obstruction of a navigable, river had been proved.

But this was not the ruling of the learned Judge according to the note which he made of his charge. His note is, "I shall tell the jury that upon the evidence the only verdict which can be rendered is one of not guilty."

This is not so much a direction on the law as a strong observation on the evidence, which a Judge could properly make in a proper case without being charged with misdirection, and one which the evidence in this case we think fully warranted—See *Dougherty* v. *Williams*, 32 U. C. R. 215; *Commonwealth* v. *Magee*, 12 Cox 549. The rule *nisi* must be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

McAlpine v. Grand Trunk Railway Company.

R. W. Co.—Obligation to fence against horses—C. S. C. ch. 66 sec. 13.

The plaintiff's horse having a right to pasture in a pasture field belonging to one M., escaped into a pea field adjoining, also owned by M., owing to a defect in the fence dividing the two fields, and from the pea field he got on to the defendants' track adjoining it, by reason of the insufficiency of the defendants' fence, and was killed.

Held, that defendants were liable, for the horse was not wrongfully in the pea field as regarded M., having got there owing to M.'s defective fence; and it therefore was not wrongfully there as regarded the defendants, who were bound to fence as against M.

The word "cattle" in C. S. C. ch. 66, s. 13 applies to horses.

Declaration: That one Neil Meehan was possessed of part of lot 40, in the 3rd concession of the township of York, which adjoined the defendants' railway: that the plaintiff had the lawful right from Meehan to depasture his horse on the said land, and his horse was depasturing thereon: that it was the defendants' duty to erect and maintain a good and sufficient fence to separate their railway from the land whereon the plaintiff's horse was so pasturing; yet the defendants neglected and refused to maintain a good and sufficient fence, by reason whereof the plaintiff's horse, depasturing as aforesaid, escaped, and strayed upon the said railway, and was damaged by the defendants' locomotive and cars upon the said railway.

Plea, general issue by statute.

Joinder.

The cause was removed from the County Court of the county of York, as the title to land was likely to be brought in question, and was tried at Toronto at the Spring Assizes, 1875, before Strong, J.

The evidence shewed that Meehan owned land lying along the defendants' railway—firstly, a field of about 1000 feet abutting on the railway, at the the time of the accident sowed with pease, and called the pea field; and another field, somewhat over 800 feet, called the pasture field, immediately adjoining the pea field, and abutting on the railway.

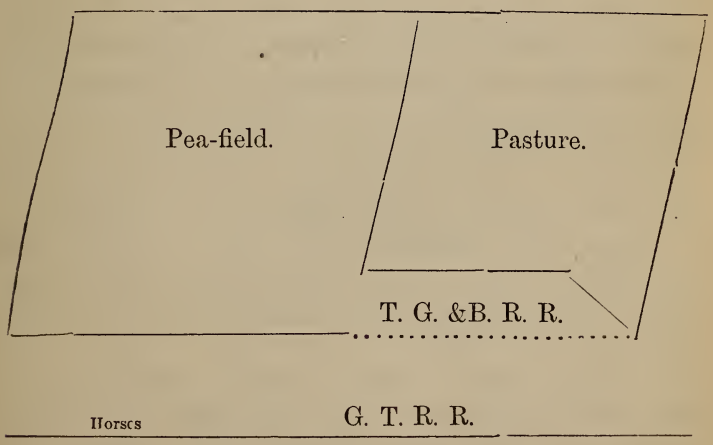
The evidence also shewed that the horse had been placed at pasture by the plaintiff on Meehan's land at $4 per month.

There was a fence between the pasture field and the pea field. There had been a rail fence all the way along the railway, and between it and these two fields. The Toronto, Grey, & Bruce Railway Company had bargained with Meehan for a right of way along his land, and they had taken possession of the whole front of the pasture field, and had removed back the defendants' fence, which separated their line of way from Meehan's pasture field.

In front of the pasture field there was no fence between the defendants' line of road and the land the Toronto, Grey, & Bruce R. W. Co. had taken possession of for their line.

By moving the fence back on part of the pasture field, the continuity of the defendants' original line was broken, so that any animal in the pea field could get from it on to the land in front of the pasture field, which the Toronto, Grey, & Bruce R. W. Co. had taken; and so also on to the defendants' line of railway at the same place.

The following rough sketch explains this statement:



Meehan said: The horses had no business in the pea field. They would not be in the pea field with my consent.

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit.

1. Because if the horse escaped from the pasture field into the pea field by defect of fences between these two fields, and from the pea field on to the railway, the horse was not lawfully in the pea field, and so there was no negligence. This was over-ruled.

2. That there was no evidence that the horse escaped by the pea field fence, which was the only fence the defendants were liable for. It was ruled there was evidence for the jury.

The learned judge left to the jury to say what fence the horse escaped over, telling them if it was through a defect in the fence in front of the pea field, the defendants were liable for that fence, but not for the other fences.

McMichael, Q. C., renewed his objections. *Black* objected that the Judge should have told the jury that the defendants were responsible for the pasture field fence, instead of telling them that the Toronto, Grey, & Bruce R. W. Co. were responsible for that fence.

A verdict was rendered for the plaintiff—damages $120.

In Easter term, May 25, 1875, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict rendered for the plaintiff should not be set aside and a nonsuit entered, or a new trial had between the parties, the verdict being contrary to law and evidence, and for misdirection of the learned Judge in charging the jury that there was evidence (of negligence against the defendants as respects the plaintiff,) to go to the jury; and that although the horse got into the pea field by reason of the defective fences between the pea field and pasture field, the defendants were liable.

In Hilary term, February 9, 1876, *Hodgins*, Q. C., *Black* with him, shewed cause. They maintained the defendants were liable, although the escape was from the pea

field, and the horse got there by reason of defective fences between the two fields. They cited *Hill* v. *Western Vermont R. W. Co.*, 32 Vermont 68; 1 *Redfield* on Railways, 4th ed., 237; *Fawcett* v. *York and North Midland R. W. Co.*, 20 L. J. Q. B. 222; S. C. 16 Q. B. 610; Consol. Stat. C. ch. 66. sec. 11, sub-secs. 1, 5; *Ricketts* v. *East and West India Docks and Birmingham Junction R. W. Co.*, 12 C. B. 160.

McMichael, Q. C., supported the rule, and relied on *McIntosh* v. *Grand Trunk R. W. Co.*, 30 U. C. R. 601.

March 17, 1876. WILSON, J.—Both sides agree that the escape of the horse was from the pea field on to the railway line; and the jury must have found the escape was by reason of the defect of fences in front of the pea field. So it is said: but what the jury did find does not appear. The evidence quite warrants such a finding, for it is almost positively shewn the tracks on the railway were visible not many yards from where they were killed. The point which we have to determine is, whether the plaintiff whose horse had the right to pasture in Meehan's pasture field, but not to be in the pea field, and which escaped from the pea field from defect of the defendants' fences there on to their railway line and was killed, has a cause of action against the defendants for their negligence to maintain their fences along the pea field? And that must be determined by the further question, whether the plaintiff, under these circumstances, can be held to be a person as against whom the defendants were bound to maintain their fences?

The defendants' liability arises by statute only. The Consol. Stat. C. ch. 66, enacts, sec. 13: "Fences shall be erected and maintained on each side of the railway, of the height and strength of an ordinary division fence." And sec. 19 enacts: "That the company shall * * * maintain, support, and keep in repair, a sufficient post or rail, hedge, ditch, bank, or other fence sufficient to keep off hogs, sheep, and cattle and thereby divide and separate

and keep constantly divided and separated such lands from the lands or grounds adjoining thereto."

The word *cattle*, I presume, applies to *horses: Wright* v. *Pearson*, L. R. 4 Q. B. 582. Holding horses to be within that section of the Act, is consistent with the sufficient fence mentioned in section 19, being a fence of the height and strength of an ordinary division fence, as mentioned in section 13, which certainly would apply to horses; and because, also, section 15 provides that, "Until such fences * * * are duly made, the company shall be liable for all damages which may be done by their trains or engines to cattle, horses, or other animals on the railway."

The mention of both cattle and horses in the last section may be used as an argument against horses being included in the word *cattle* in the 19th section; but on a reasonable construction of these different sections, and the purpose which the Legislature had in view, I do not doubt that horses were as much intended to be guarded and provided for as the other farm animals of inferior value. This question was not raised; but as it might not be perfectly obvious, I was desirous to remove it out of the way.

There is no common law liability to fence, either as respects the highway, nor as respects adjoining proprietors.

The company were, however, and are, as stated, bound to fence against Meehan, the adjoining proprietor of the pea field. I speak of it alone, because I accept the finding of the jury, and the admission almost of both parties, that the escape of the horse was through or over that fence. I am of opinion, also, that the fence in question, as it must have been found by the jury, was not a sufficient fence such as the statute requires.

Upon these facts, I have no doubt, that the defendants would have been liable to Meehan if his horse had escaped by the pea field fence on to the track and been killed.

It would make no matter in such a case that Meehan had his horse in the pasture field; and that the fence between these two fields was not sufficient to prevent horses in the one field from getting into the other. Meehan would not

be obliged to have any fence whatever between his two fields. It would be, and was of no consequence to the defendants, whether Meehan had any or what kind of division fences between his different fields. Their duty was to fence off their line from his land. That being the rule as to Meehan, does it make any difference that the horse which was killed was not Meehan's, but was the plaintiff's, who had only the right of pasturage in the pasture field, and who had no right whatever to have his horse in Meehan's pea field ?

I am of opinion it makes no difference, because Meehan was responsible for the horse escaping from his pasture field into his pea field, and as respects Meehan, the horse was not wrongfully in the pea field.

When Meehan undertook to pasture the plaintiff's horse, what was his obligation to his plaintiff?

It was to take all due care of the horse; that it should come to no harm by his neglect; that the field should be safe for the horse to be in: *Booth* v. *Wilson,* 1 B. & Al. 59; that the fences of the field in which it was put, were sufficient to prevent its escape: *Broadwater* v. *Blot,* 1 Holt's N. P. 547; that there were no dangerous cattle in the field with the horse, likely to do it injury: *Smith* v. *Cook,* L. R. 1 Q. B. D. 79; and I presume also that there was no poisonous growth or article on the land of which the owner had notice, or should be deemed to have had notice, which would injure the horse, for that would be different from a demise of the vesture or eatage of the land: *Sutton* v. *Temple,* 12 M. & W. 52. That being Meehan's duty towards the plaintiff whose horse he was pasturing, he would have been liable to the plaintiff for putting his horse in the pasture field, which was not sufficiently fenced, for its escape and final loss.

As respects Meehan, the plaintiff's horse was not wrongfully in the pea field. He could not have impounded it for trespassing when it got there by his own defect of fences.

The plaintiff's horse not having been in the pea field wrongfully as against Meehan, it was not there, it is quite

clear, wrongfully as regards defendants. Meehan could have maintained an action against the defendants in his own name for the loss of the plaintiff's horse, because the horse was in his care and possession, and he was answerable over for it: *Booth* v. *Wilson*, 1 B. &. Al. 59; *Powell* v. *Salisbury*, 2 Y. & J. 391.

I may refer, also, as applicable somewhat to this case, to *Fawcett* v. *York and North Midland R. W. Co.*, 16 Q. B. 610; *Ricketts* v. *East and West India Docks and Birmingham Junction R. W. Co.*, 12 C. B. 160; *Laurence* v. *Jenkins*, L. R. 8 Q. B. 274; *Dawson* v. *Midland R. W. Co.*, L. R. 8 Ex. 8, and *Kilmer* v. *Great Western R. W. Co.*, 35 U. C. R. 595.

The rule must therefore be discharged.

HARRISON, C. J. and MORRISON concurred.

Rule discharged.

BIGELOW ET AL. v. BOXALL.

Sale of goods—Implied warranty.

Where an article is supplied for a particular purpose—such as, in this case, a furnace to heat the plaintiff's offices—and the vendor is to put it up for that object, there is an implied warranty that it will answer, and will be put up so as to answer, the purpose intended.

In this case it was held that there was nothing in the defendant's written tender, set out below, to exclude the implied warranty, and that the evidence supported a verdict for the plaintiffs.

DECLARATION: that the defendant, by warranting that a furnace and appliances thereto was then reasonably fit and proper to be used for the purpose of heating premises occupied by the plaintiffs, sold the same to the plaintiffs, to be used for the purpose aforesaid, and agreed to put the same up in good working order; but that the furnace was not then reasonably fit and proper to be used for the purpose of heating the premises, &c.. and it was not put up in

good working order, whereby the plaintiffs were injured in their health and comfort and in their business, and incurred expense in supplying other means of heating, &c., and have not received back the price, or any part thereof, paid by the plaintiffs to the defendant for the furnace and appliances.

Pleas: 1. That defendant did not warrant as alleged.

2. That the furnace was reasonably fit and proper to be used, &c.

3. That he did not agree as alleged.

4. That it was put up in good order.

Issue.

The case was tried before Strong, J., at the Toronto Spring Assizes, 1875.

It appeared from the evidence given at the trial, on the part of the plaintiffs, that one of the plaintiffs called on the defendant and stated that they wanted a furnace for heating their offices that could be easily and simply managed: that the defendant inspected the premises for which the furnace was required, and said he would furnish one and put it in such as they required, one that would keep the building in a uniform temperature and would give satisfaction in every respect; and being asked the cost, said that he would send the plaintiffs a statement, and in pursuance sent the plaintiffs the following tender:—"I propose to put in furnace in your office on Adelaide street, heating the two lower and two upper rooms, which is first and second flats, cutting all holes required for the construction of said furnace, with registers complete, cold air box to furnace, and leaving everything in a satisfactory condition. The furnace will be one of the best manufactured in Canada or United States; it is a self-feeding and requires but little attention, and am satisfied will give the utmost satisfaction. I refer you to those parties I have put them in for, viz., (setting out the names and addresses of five persons). I can put it in immediately—I think it would be complete by Saturday—for the sum of $250." This tender the plaintiffs accepted verbally. The furnace was

put in in a few days. It turned out unsatisfactorily, constantly emitting gas most injurious to health, and to such an extent that, as one of the plaintiffs stated, he had frequently to leave the office: that the rooms could not be kept at a proper temperature: that the defendant was notified of the defective working of the furnace: that he came and examined it, sent his men on several occasions to remedy the defects, but without effecting any change.

Several persons belonging to the offices were examined as witnesses, as well as those who attended to the furnace, and they testified to its being unfit for the purposes for which it was intended: that the defendant was notified in writing of the defects, and eventually to remove it, and on neglecting to do so this action was brought: that the plaintiffs had to remove the furnace and get another in its place, which answered well. The plaintiffs had paid the defendant the price agreed on.

On the part of the defendant, the evidence went to shew that the defendant dealt in the kind of furnaces in question, although he was not the manufacturer of them: that the defendant being notified of the complaints, went to see the furnace: that he explained to the plaintiffs how the furnace had to be used: that he re-cemented it, &c. Several witnesses were called, and the effect of the testimony went to shew that the furnace was of a kind of which the defendant had heard no complaint of before, and that the results complained of by the plaintiffs were attributable to bad and improper management of the furnace; and witnesses were called who had in use similar furnaces which worked well.

In reply, evidence was given by the plaintiffs to shew that there was no mismanagement of the furnace.

At the close of the case, it was contended by the defendant's counsel that the plaintiffs could not recover in this action, as the contract set out in the declaration was upon an implied warranty, and not on the express warranty contained in the defendant's tender, and that the bad management of the furnace by the plaintiffs caused the matters complained of. The plaintiffs submitted that

there was the implied warranty that the furnace was reasonably fit for the purpose it was intended for, and that the putting together the various castings, &c., required skill, &c., which defendant failed in, and that the evidence did not establish mismanagement of the furnace.

The learned Judge, before whom the case was tried without a jury, found the facts to be, that the bad working of the furnace was not attributable to any want of skill or care on part of plaintiffs, but was owing to some defect in its construction or the way in which it had been put up; and being of opinion, though not without doubt, that there was an implied warranty that the furnace should answer the purpose for which it was intended, he found for the plaintiff and $262.22 damages, the amount paid by plaintiffs to defendant for the furnace, and he reserved leave to the defendant to move, &c.

In Easter term following, May 21, 1875, *M. C. Cameron*, Q.C., obtained a rule to enter a nonsuit or verdict for the defendant, or to reduce the damages to a nominal amount, or for a new trial, the verdict being contrary to law and evidence.

During this term, February 9, 1876, *Hagel* shewed cause. This is an action on an implied warranty. It was contended by defendant's counsel at the trial that the writing put in shewed an express warranty, and that no implied warranty could be set up, but the learned Judge was of a contrary opinion. The plaintiff is willing to have his verdict reduced by $50, the value of the article as it stands. An express warranty does not prevent a plaintiff relying on an implied one: *Brown* v. *Edgington*, 2 M. & G. 279. That case also shews that defendant is liable for the insufficiency of the apparatus, although he was not the manufacturer. If an express warranty is maintainable upon the writing, the plaintiff should be allowed to add a count. He also cited *Bigge* v. *Parkinson*, 7 H. & N. 955; *Langridge* v. *Levy*, 2 M. & W. 519; *Mallan* v. *Redloff*, 17 C. B. N. S. 588.

McMichael, Q. C., contra. There was no want of skill

on defendant's part. He only undertook to supply as good an article as he supplied to others. The Judge found there was no want of skill on defendant's part, but something wrong in the construction of the article. There was no express warranty, and the implied warranty, if any, was not broken.

March 17, 1876. MORRISON, J.—I am of opinion that the plaintiffs are entitled to our judgment. The evidence given at the trial fully warranted the learned Judge in entering a verdict for the plaintiffs. The evidence was quite sufficient to support the contract laid in the declaration, viz.: that the furnace contracted for by the defendant to be put in the plaintiffs' premises was one that would be reasonably fit for the purpose designed, and that the defendant would so put it in that it would answer such purpose.

Where an article is supplied for a particular purpose, and the vendor is to set it up to effect the object in view, such as in the case now before us, a furnace, the law implies that the furnace will be one that will answer the purpose for which it was intended, and that the putting of it together and the setting of it in its place will be so done that the object in view will be attained.

Here the defendant by his tender or proposition undertook to put in a furnace that would heat the plaintiffs' rooms, doing all that was necessary in the construction of the furnace, with the appliances for its completion, in a satisfactory manner, the furnace itself being one of the best manufactured in Canada or the United States, requiring little attention, and that it would give the utmost satisfaction. There is nothing in the defendant's tender to exclude the implication of law that it will be a furnace reasonably fit for the purpose of heating the rooms indicated, and that the defendant would so put it together and in its place that it would reasonably effect the object in view. The defendant's attention was at the time distinctly called to what the plaintiffs desired, and it is only reason-

able to assume that they relied on his judgment and skill that he would put in a furnace such as they required.

In *Brown* v. *Edgington*, 2 M. & G. 279, Tindal, C. J., said. p. 289, "It appears to me to be a distinction well founded both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed."

In the case of *Jones* v. *Just*, L. R. 3 Q. B. 197, all the authorities bearing on the point are there reviewed.

Mellor, J., in delivering the judgment of the Court, said: "Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty, that it shall be reasonably fit for the purpose to which it is to be applied:" *Brown* v. *Edgington*, 2 M. & G. 279; *Jones* v. *Bright*, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own. * * It must be taken as established that, on the sale of goods by a manufacturer or dealer, to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose * * Accordingly, in the case of *Bigge* v. *Parkinson*, 7 H. & N. 955, upon a contract to supply provisions and stores to a ship guaranteed to pass the survey of the East India Company's officers, it was held by the Court of Exchequer Chamber that there was an implied term in the contract, that the stores should be reasonably fit for the purpose for which they were to be supplied, notwithstanding that the vendor

had specially contracted that they should pass the survey of the East India Company's officers."

I see no reason for thinking that the plaintiffs' conduct in removing and rejecting the furnace was other than *bonâ fide*, and owing entirely to the fact that the furnace could not be used. On the whole, I am of opinion the defendant's rule should be discharged.

It appears by a note made by the learned Judge, that when he entered a verdict for the amount paid by the plaintiffs to the defendant, it did not occur to him that the plaintiffs had the materials of the rejected furnace, and he proposed to alter the verdict; but not being furnished with the record, no change was made.

The learned Judge thinks that the verdict should be reduced by $50, being a fair deduction as the present value of the furnace. The rule will therefore be discharged, but the verdict will be reduced to $212.22.

HARRISON, C. J., and WILSON, J., concurred.

Rule accordingly.

The Ætna Life Ins. Co. v. Nathaniel Green.

Principal and agent—Payment to agent by cheque.

Defendant, through one B., the plaintiffs' agent, effected a life policy with the plaintiffs. B., who had authority to receive the premium, brought the policy with the receipt for the first premium, issued from the plaintiffs' head office, to defendant, who was in charge of a branch of the bank at which B. kept his account. Defendant drew a cheque an another branch of the bank, and B requested him to place the amount to the credit of his bank account, which was done in the usual way, and the cheque charged to defendant; but B.'s account was at the time overdrawn, and he afterwards became insolvent.

Held, that the payment thus made to B. was a payment to the plaintiffs.

Declaration on the common counts.

Plea, payment.

This action was tried before Strong, J., at the Toronto Spring Assizes, 1875.

From the evidence at the trial it appeared that the defendant, who at the time was temporarily in charge of the office of the City Bank of Montreal in Toronto, during the absence of the manager, made an application to the plaintiffs' company for an insurance on his life through one Bailey, acting as agent of the plaintiffs: that Bailey brought defendant the policy and a receipt for the premium ($116.18), issued from the head office of the plaintiffs in the United States, signed by the secretary of the company, and counter-signed by the general agent of the plaintiffs in Toronto: that Bailey kept a bank account at the chief office of the City Bank in Toronto: that he asked the defendant, after the latter examined the policy, to place the amount of the premium to the credit of his, Bailey's, account; this took place at the chief office of the bank, the defendant making no suggestion that it should be so placed to his credit: that the defendant handed his own cheque to the teller for the amount drawn on another branch of the bank, where the defendant kept his private account, which amount was passed to the credit of the agent, Bailey, at the chief branch; and it was so done at the express request of Bailey; at the time this was done Bailey's account was overdrawn at the bank. The policy and the

receipt from the head office were at the same time handed to the defendant.

The ledger keeper of the bank testified that he was in the bank when the policy was delivered to defendant: that he heard Bailey ask defendant to put the premium to his credit: that the cheque was handed to the teller first, and then the deposit slip with the amount of deposit was handed to the witness, who credited Bailey's account with the amount. The witness also stated that the cheque was drawn by defendant on his private account in the other office, and it was dealt with as a cheque on another bank: that Bailey came to him afterwards and asked the clerk if the premium had gone to his credit, and he told him it had.

On cross-examination he stated that he heard Bailey say to defendant, "Put that to my credit," and that he saw the cheque handed to the teller. The witness could not say how much Bailey's account was overdrawn.

The general manager of the plaintiffs' company, who resided here, was called by the plaintiffs. He stated that when he received the policy from the head office he handed it to Bailey, through whom the proposal was received: that the company employ brokers to solicit insurances: that Bailey, who was a broker, had solicited defendant's proposal: that he gave Bailey authority to receive payment and deliver the policy: that the receipt from the head office, counter-signed by the witness, was given to Bailey, with the policy to which it was attached: that this was done on the 10th July, 1874: that on the 13th he asked Bailey about the policy: that he waited for some days, and not getting payment of premium he wrote defendant, and called and saw him, when he stated that he had paid the premium to Bailey: that he saw him again, when he informed him that Bailey's account was overdrawn; and that he had credited Bailey with the premium, and he wrote to defendant on July 28th, "Your statement to me was that Bailey's account was overdrawn $79, notwithstanding your letter of to-day. I think also that Mr. Bailey's bank book will show the matter as it really stands. In the meantime I shall take steps

to have the policy cancelled unless the premium is paid forthwith;" to which Mr. Green replied by letter, not put in. The witness stated that if Bailey had been paid by check payable to bearer, it would have been a good payment when cashed.

Upon this evidence the learned Judge entered a verdict for defendant, it being agreed that the plaintiffs should be at liberty to move this Court to enter a verdict for them, the Court to be at liberty to draw all inferences of fact which a jury could have drawn.

During Easter term, May 25, 1875, *Hagel* moved accordingly.

And during this term, February 10, 1876, *M. C. Cameron* shewed cause. The plaintiffs sue the defendant for a premium on a life insurance policy. The defendant is a bank manager, and answers the plaintiffs by saying, "I paid the premium to your agent by setting it off against a debt due by the agent to the bank." If the facts are as the plaintiffs allege, either the defendant has not paid and is under no obligation to pay the premium, and the policy according to the conditions is avoided, and the defendant not insured; or if the policy is in force, and defendant insured, it must be because the transaction with the agent amounted to a payment to the company. He referred to *May* on Life Insurance, secs. 134, 136. There was no contract to pay the premium.

Hagel, contra. The point now raised was not taken at the trial, and is raised for the first time now. It is not supported by authority. Receiving and accepting the policy was a sufficient consideration to enable the plaintiffs to sue for the premium. The cheque never was put in the agent's hands, and the entries in the bank books were not made till after the agent left. Defendant was of course aware that the agent paid a personal debt with the company's money. He cited *Bartlett* v. *Pentland*, 10 B. & C. 760; *Barker* v. *Greenwood*, 2 Y. & C. Ex. 415; *Kay* v. *Brett*, 5 Ex. 269; *Todd* v. *Reid*, 4 B. & Ad. 210.

March 17, 1876. MORRISON, J. This is not the case of a person setting off a debt due to him by the agent of another in payment of a sum payable by such person to the principal of such agent.

The facts are shortly these. That the defendant, through one Bailey, acting as an agent of the plaintiffs, effected a policy in their company on his life; that Bailey, as such agent, brought the policy and the receipt for the first premium issued from the head office of the plaintiffs' company in the United States, countersigned by the plaintiffs' general manager here, to the defendant; that Bailey kept his bank account at the chief branch of the City Bank in Toronto; that the defendant, on the day Bailey produced the policy and the receipt for the premium, was in temporary charge of the branch of the bank, in the absence of the regular manager: that in payment of the premium, he drew a check for the amount on another branch of the City Bank, where the defendant had his bank account: that Bailey requested defendant to place the amount to the credit of his bank account, which was done in the usual way, and in the ordinary course the amount of the defendant's check was paid by being placed to his debit at the other branch. Bailey had authority to receive payment of the premium. At the time the cheque was given, and the amount placed to the credit of Bailey, his account at the principal branch was overdrawn.

It was pressed that the plaintiff being an officer of the bank, that in this matter he stood in a different position from other persons. I cannot see or infer from anything appearing at the trial that the defendant had any possible interest or object in paying the premium as he did, or in assenting to the request of Bailey to have it placed to his credit. The check was accepted in payment of the premium by the agent. The fact that Bailey in place of cashing the cheque had it placed to his credit did not, in my opinion, deprive the transaction of the character of a payment by defendant.

If the defendant had handed to Bailey bills of the bank or

specie, and the latter had immediately deposited the same to his credit, could it be contended that the defendant had not paid the premium? Is there any real difference between that mode of payment and the one in question? I think not.

The case of *Bridges* v. *Garret*, L. R. 5 C. P. 451, in the Ex. Ch., is a strong authority in favour of the defendant. That was an action brought by the lord of the manor to recover from the defendant the amount of a fine which it was alleged was paid to Craig, who acted as agent to receive the money. The amount was paid by a cheque of the defendant, crossed so that it was only payable to Craig's bankers; his account was then overdrawn, and the amount was passed to his credit. The bank refused to pay over the amount of the fine, the proceeds of the cheque; and the question was, whether the payment by such cheque was a good payment.

The Court of Common Pleas, Byles, J., diss., L. R. 4 C. P. 580, held it was not a payment, as under the circumstances the agent never did and could not receive the amount so as to be able to hand it over to his principal, the lord of the manor.

An appeal to the Exchequer Chamber was brought, and it was there argued, as here, that the agent's authority did not extend to the receipt of the amount in such a shape as would preclude him from transferring over to the plaintiff the amount of the fine he so received. There, as here, the agent became insolvent.

Cockburn, C. J., in giving judgment, said, at p. 454, "Then comes the question whether the payment discharged the defendant as against the plaintiff, or whether the form and mode of it was such as to render it invalid. There is no doubt that where an agent is authorized to receive money for his principal, he cannot allow it by way of set-off in accounts between the payer and himself: he must receive it in money. If, however, payment is made by cheque, and the cheque is duly honoured, that is a payment in cash. There is nothing in the circumstance of a cheque being

given which invalidates the payment. The present case, however, is a little complicated by the fact of the cheque having been crossed. It appears that the defendant, at Craig's request, crossed the cheque with the names of Craig's bankers. Craig's bankers got the cheque cashed, and carried the amount to the credit of Craig's account with them. If Craig's account had not been overdrawn, he would have had the money. The cheque, therefore, was, in point of fact, money. It was the same thing as if the defendant had paid the amount in cash, and Craig had paid the cash to his account with his bankers, and had forwarded his own cheque to the lord or to the steward; and the bankers had, in consequence of the balance being against him, declined to honor his check. If Craig was authorized to receive the money, I think the payment to him was a payment to the plaintiff, and that there was nothing in the mode of payment to take the case out of the ordinary rule."

Kelly, C. B., and Channell, B., concurred.

Blackburn, J., said, p. 455, "Then comes the question upon which alone there was a difference of opinion in the Court below. The majority of the Court thought that the payment by cheque, under the circumstances, was not sufficient. I cannot help thinking that those learned judges lost sight of the foundation of the rule upon the subject of payment through an agent."

He then shews the distinction between bankers' or merchants' clerks employed to receive money, and attorneys or commercial agents—the former must hand over the money as they receive it, the latter, an equivalent sum—and proceeds to say, p, 456, "That which took place here, however, was no more than if the defendant had paid in the money to Craig's bankers. That would have rendered Craig liable to the plaintiff, * * and would have discharged the defendant; and the fact of Craig's account being at the time overdrawn, would have made no difference." The other Judges concurring, the judgment of the Common Pleas was reversed.

It was pressed by Mr. Cameron, assuming that no payment was made as contended, that there was no contract or promise by the defendant to pay this premium, express or implied.

I cannot concur in that view. This was the first premium payable, and the fact that the defendant accepted and retained the policy and the receipt of the head office, and maintaining that the contract of insurance was completed and the risk commenced, is quite sufficient, in my opinion, to raise a promise to pay the amount. The fact that the plaintiffs' general manager wrote the defendant that he would take steps to cancel the policy if the premium was not paid forthwith, during the argument rather impressed me against the plaintiffs' right to bring the action, but it is not necessary to consider the point. On the whole, I am of opinion the rule should be discharged.

HARRISON, C. J., and WILSON, J., concurred.

Rule discharged.

STUBBS v. JOHNSTON ET AL.

Agreement to get out logs—Construction—Verdict—Damages.

The plaintiff agreed to cut, draw, and deliver for the defendants at a specified place 4,000 standard logs at 50 cents each; also, to make all branch roads, the defendants agreeing to make the main road: "the defendants to provide the pine timber, which is to be cut on the lots mentioned in the schedule A. hereon endorsed." This schedule enumerated five lots, containing 1,800 acres.

Held, that defendants were not bound to point out to the plaintiff the trees to be cut on the lots in question, but that it was sufficient that there were trees on these lots, as the jury found, enough to make 4,000 logs.

The jury, in answer to questions, found that the plaintiff had cut and delivered only 600 logs, and had received $400, so that he was overpaid $100; but they found also that defendants did not make the main road in reasonable time to enable the plaintiff to get the logs out, by which the plaintiff had sustained $10 damages. *Held*, that the plaintiff was entitled to a verdict for $10, notwithstanding that he had been overpaid.

THIS action was brought to recover damages for breaches of the following agreement: "Agreement made, * * whereby the plaintiff agrees to cut, draw, and deliver on the east beach (at a point suitable for rafting) of the township of Lindsay, 4,000 standard logs of pine timber, on or before the 15th March, 1875, and to erect his own shanties, &c.; also, to make all branch roads, the defendants agreeing to make the main road; provided, that if the plaintiff shall have to haul logs more than two miles, he shall be paid a reasonable sum extra for any logs over and above the price hereinafter agreed to be paid. And the defendants agree to make the trunk or main road necessary for getting out the logs, and to pay for the logs the sum of 50 cents per standard, in manner following, that is to say, $500 when 1,000 standard logs are cut and delivered, &c., and so on as the logs are delivered, with a provision that if the plaintiff delivered 2,000 additional logs he would be paid at the same rate, &c., and at the end of the agreement was the following: "The defendants to provide the pine timber, which is to be cut on the lots mentioned in the schedule A. hereon endorsed."

Schedule A. was endorsed, enumerating nine lots, 1,800

acres, in a block, and, from the map put in, fronting on the Georgian Bay, Lake Huron.

The breaches laid in the first count were, that the defendants did not provide the pine timber necessary to make the logs on the lots in question, and did not make the trunk or main road necessary for getting out the logs, &c.

There was a second count for money payable for getting out 1,000 logs, whereby defendants became liable to pay $500.

The defendants pleaded to the first count that they did provide the pine timber, &c., and to the second count, non-delivery of 1,000 logs; and payment.

The cause was tried before Harrison, C. J., at the Fall Assizes at Owen Sound.

A great deal of evidence was given on both sides as to the quantity of the timber growing on the lots, the roads cut, and the number of logs cut by the plaintiff, &c.

At the close of the case, the learned Chief Justice submitted to the jury several questions, which they answered:

1. How many standard logs were cut and delivered by the plaintiff? Answer.—600.

2. Were there pine trees on the lots in question sufficient to make 4,000 logs? Answer.—There was sufficient timber.

5. Did defendants make the main road within such reasonable time as to enable plaintiff to get out the logs? Answer.—They did not.

If not, what damage did the plaintiff sustain in consequence? Answer.—$10.

The plaintiff had received from defendants on account of the contract $400, and as the jury found that 600 logs were only delivered, at 50 cents, he was overpaid $100.

Under these circumstances, the learned Chief Justice, thinking that a jury, in awarding damages on the record, would have a right to look at the fact of the over-payment, and, if they saw fit, deduct the $100 from any amount they might find the plaintiff entitled to recover for breach of the contract, and the amount which they found for such breach being $10, under these circumstances the learned

Chief Justice entered a general verdict for the defendants, reserving leave to enter a verdict for $10, or for nominal damages on the first count, if this Court should be of opinion that the plaintiff was entitled so to recover.

The defendants' counsel, at the close of the learned Chief Justice's charge, submitted that the defendants, under the contract, were bound to point out the timber to plaintiff.

The learned Chief Justice declined so to charge the jury.

In Michaelmas term, November 18, 1875. *J. K. Kerr* obtained a rule to set aside the verdict, on the ground that it was contrary to law and evidence, and for misdirection and non-direction by the learned Chief Justice, in not directing the jury that the defendants were, under the contract sued on, bound to point out to the plaintiff or explain to him which timber on the lots mentioned was the timber to be cut; or, that the defendants having undertaken to point out the timber, they were bound to do so; or, that upon giving notice to the defendants that he was not able to find timber on the lots, it was the defendants' duty to point out such timber to the plaintiff.

The case was argued during this term, February 19, 1876, by *Osler*, for the defendants. The defendants rely on the objection taken at the trial that they were not bound to point out the timber to be cut. All that the agreement binds the defendants to is, that there is and shall be sufficient timber on the land to be cut. There was in fact the quantity of timber on the land, and the jury have so found. The word "provide," in the agreement, means that defendants are to provide the land with the timber on it, not the timber alone. He referred to *Lord Clifford* v. *Watts*, L. R. 5 C. P. 577.

J. K. Kerr, contra. Sufficient timber could be found on the land and sufficient was not pointed out. Defendants were bound under the agreement to point it out. He referred to *Woodfall* L. & T., 10th ed., 116; *Thomas* v. *Cadwallader*, Willes 496; *Holme* v. *Guppy* 3 M. & W.

387; *Mackintosh* v. *Midland Counties R. W. Co.*, 14 M. & W. 548; *Neale* v. *Ratcliff*, 15 Q. B. 916; *Martyn* v. *Clue*, 18 Q. B. 681; *Jewett* v. *Spencer*, 15 M. & W.; *Addison* on Contracts, 7th ed., 170.

March 17, 1876. MORRISON, J.—As to the finding of the jury, we think there is evidence to warrant the jury arriving at the conclusions they did; and so the only point to be considered is the effect of the construction to be put on the last clause of the agreement.

In a few words, the agreement is simply this: The plaintiff agrees to cut, &c., and to deliver to the defendants 4,000 standard logs of pine timber, the defendants agreeing to provide the pine timber trees out of which the logs are to be made on certain lots mentioned and endorsed on the agreement.

The plaintiff contends that the meaning to be given to the word "provide," so used, is, that the defendants were bound to point out (for the argument goes that far) to the plaintiff, as a condition precedent to his cutting the logs, where the trees stood on the 1,800 acres, and out of which the plaintiff was to make the 4,000 standards.

The defendants, on the other hand, submit that it only meant or amounted to a statement that the logs were to be cut on the lots mentioned, and, at the utmost, to an undertaking that the plaintiff would find pine timber on these lots out of which he could cut the logs.

That there was sufficient timber trees within the limits, the jury, as a fact, found, so that we are relieved from any difficulty on that head.

It seems to me that the sensible construction to be put on the stipulation is that contended for by the defendants, the same, in effect, as if, after the word "cut," in the beginning of the agreement, were inserted the words, "on the lots provided for that purpose mentioned in the schedule A. hereon endorsed."

I think it would be unreasonable to construe the agreement to mean that the defendants were bound from time to

time to point out to the plaintiff the particular trees on the particular portions of the 1,800 acres he was to cut, or that such was the intention of the parties.

We may fairly assume that a person agreeing to cut and get out saw logs on specific lots or limits, for another, as part of his engagement undertakes to seek out and select the timber trees.

Taking the whole of this agreement together, the necessary implication and the common sense construction to be put on it is, that on the part of the defendants they undertook that the requisite timber trees to make 4,000 standard logs were on the lots mentioned, and that the plaintiff was at liberty to select and cut such timber trees as he thought proper and best adapted to fulfil the agreement.

The word "provide," used in the agreement, was, in my opinion, intended to apply and is properly referable to the lots, just as if the agreement had, in other words, said, the defendants providing the following lots of land, &c., on which the plaintiff will find the requisite timber to make the logs, and not, as contended, on which the defendants undertake to seek out and find for the plaintiff the necessary trees to enable the plaintiff to cut the 4,000 standard logs.

The jury, as I have said, found that there was sufficient pine timber within the limits, and we may fairly assume the failure to find it was the result of the plaintiff's neglect or omission to search for it.

I am, therefore, of opinion there was no misdirection or want of direction on the part of the learned Chief Justice.

The only other point is, whether the plaintiff is entitled to have a verdict for the $10 on the first count for the breach assigned that the defendants did not make the main road as agreed. I think the plaintiff is strictly entitled to have the verdict so entered for the $10.

The rule will, therefore, go to enter a verdict for the plaintiff on that count, the verdict on the other to stand.

HARRISON, C. J., and WILSON, J., concurred.

Rule absolute accordingly.

MITCHELL ET AL. v. THE GREAT WESTERN R. W. CO.

G. W. R.—Award for land—Defective title—Right to recover on award.

The plaintiffs were executors and trustees under the will of L., by which he devised the lot, of which the land in question formed part, to his wife during her life or widowhood; in case of her second marriage, he directed his executors to sell it and invest the price, and to pay to his wife one-third of the interest during her life; and in the event of her death, as soon as it could be done with due regard to the interest of the property, he directed them to sell the lot and divide the proceeds among his children and grandchildren, as specified. Some of them were infants, and the widow was in occupation of the farm, unmarried.

Under these circumstances the plaintiffs, under the statutes relating to the defendants, entered into an arbitration with defendants, who required part of the lot for a gravel pit, and were unable to agree upon the price; and the arbitrators, on the 29th November, 1872, awarded that defendants should pay to the respective persons entitled to receive the same $9,000 for said land, which they assessed and declared to be the full value of the fee simple. The widow was no party to the arbitration. On the 3rd December defendants notified the plaintiffs that they would not take the land, of which they had never taken possession, and that they withdrew from the purchase. The widow, who continued in occupation, did not convey to the plaintiffs her interest until 7th January, 1874, and having tendered a conveyance to the defendants in February, 1874, they brought this action on the award on the 23rd of March following.

Held, that the plaintiffs could not recover on the award. Per MORRISON, J.—The plaintiffs were neither owners nor occupiers, and at the time of the award had no beneficial interest in the land; the deed by the widow of her interest, made afterwards, would not give them the power to sell, neither of the events on which such power was to be exercised having happened, or, at all events, the plaintiffs' title under it was too doubtful to force upon a purchaser; the delay in tendering a conveyance, if the after-acquired title had enabled the plaintiffs to make a good title, was such as to prevent the plaintiffs from enforcing the award; and the award was bad for uncertainty, in not stating the respective persons to whom the money should be paid and the respective sums.

DECLARATION—First count: upon an award made under the provisions of the Railway Acts incorporating the defendants, between the plaintiffs, executors, and trustees of one Lewis Anguish, deceased, respecting the value of a part of lot 1, in the 8th concession of Rainham, by which award the arbitrators named awarded the sum of $9,000. The declaration will be found fully set out in the report of the judgment on demurrer, 35 U. C. R. 148.

Common counts, for a sum awarded to the plaintiff, and upon an account stated.

Pleas: traversing the entering into arbitration, appointment of the arbitrators, and the making of the award.

Sixth plea: That the land mentioned in the first count was never taken possession of or occupied, or in any way used by the defendants, and that forthwith after the making and publication of the award, to wit, on the 3rd day of December, 1872, the defendants, by notice duly served upon the plaintiffs, did declare and give notice to the plaintiffs that the defendants would not assume possession of the lands, and that all intention of occupying the same or any part thereof, was abandoned by the defendants, and that the defendants disclaimed any interest in the said award, and that nothing would be done to affect the interests and rights of the plaintiffs, or of the devisees of the said Lewis Anguish, deceased, in the said lands, and that the defendants then abandoned and withdrew from the purchase of and all claim or interest to or in the said lands, and the plaintiffs then resumed their occupation of the lands, and have ever since the giving of the said notice used and occupied the said lands, and have possessed fully their rights and privileges in respect thereof, free from any claim or interference from the defendants.

To the second count a similar plea was pleaded.

Tenth plea—To the first and second counts: that in and by the said award the said sum of $9,000 was awarded to be paid to the respective persons entitled to receive the same, and is assessed and declared to be the full value of the fee simple of the said lands. And the defendants say that the plaintiffs were not at the time of the said arbitration and award in the declaration mentioned, or at the commencement of this suit, either as such trustees and executors or otherwise, the owners or occupiers of the said lands or any part thereof, or entitled to the fee simple thereof, and the said plaintiffs at the time aforesaid had not a good title to the said lands or any part thereof, or any right or power to sell or convey the same to the defendants and were not the persons entitled to receive the said sum of $9,000 or the value of the said lands.

There was also a plea of never indebted to the whole declaration.

There were other pleas which were demurred to and held bad. See *Mitchell et al.* v. *The Great Western R. W. Co.*, 35 U. C. R. 148, in which the demurrers to the various pleas were discussed and decided.

The cause was tried at the Cayuga Fall Assizes, 1874, before Patterson, J., without a jury, when a verdict was entered for the defendants.

At the trial the award in question was put in. After reciting that the defendants required the land in question for their railway, and that the plaintiffs, executors of the late Lewis Anguish—who was the owner of the lot in question—and the defendants not being able to agree upon the amount to be paid as compensation for the land and damages thereto, the plaintiffs appointed an arbitrator, and the defendants also appointed an arbitrator in pursuance of the statute to assess the value of the land so to be taken: that the arbitrators could not agree upon a third arbitrator, and that the County Court Judge, in pursuance of the statute, appointed the third arbitrator: that the three arbitrators took upon themselves the burden of the award: that two of the arbitrators came to a determination and award of and concerning the same, and they awarded as follows:—

"That the said company shall pay to the respective person or persons entitled to receive the same the sum of $9,000 of lawful money of Canada, as and for the said lands, * * which said sum of $9,000 they assess and declare to be the full value of the fee simple of the said lands, and the amount of their award in the premises; and they do further by these presents specify and settle the costs of the said award at and to be the sum of $147.50."

The award was signed by the two arbitrators and dated 29th November, 1872.

On the part of the defendants, notice to arbitrate, and the due appointment of the arbitrators was admitted; also probate and copy of testator's will.

By this will, after devising other portions of his real estate

to several of his children, he devised the farm he lived on; of which the land here in dispute formed part, as follows: "To my wife Hester, for her use during her life, if she remain unmarried that long, or as long as she remains my widow, * * and in case my said wife Hester should marry, then I hereby direct and authorize my executors hereinafter mentioned, to sell and dispose of said farm, * * and invest the price thereof at interest, and to pay unto my said wife Hester the third part of the interest yearly accruing upon said sum, yearly in each and every year as long as she lives." And after the death of his wife the executors, as soon as, with due regard to the interests of the estate, it could be done, were to sell the property so reserved for his wife, and distribute the proceeds as the will directs—chiefly among his sons and daughters.

The plaintiffs admitted that on the 3rd December, 1872, defendants notified the plaintiffs that they would not assume possession, the notice being that set out in the sixth plea; also that the amount awarded was for the fee simple of the land: that no conveyance was made to plaintiffs by the widow, except by a deed of 7th January, 1874, which, with a conveyance from the plaintiffs to the defendants, was tendered in February 1874, and was put in, and that the plaintiffs had no title except under the will and under the deed: that the widow was living and unmarried, and that the children and other persons mentioned in the will were all living; and that two of the children to whom the residuary devise was made were infants, and some of them were of full age at the time of the arbitration: that the widow had lived on the premises from the testator's death to the present time, and that the plaintiffs knew the same, and that the defendants had never occupied or taken the lands.

Evidence was given by the arbitrators as to the making of the award, &c. It appeared they (the defendants) never occupied the land, and the value put by the plaintiffs on the land as farming land was $50 an acre.

This action was commenced on the 23rd March, 1874.

At the close of the case the plaintiffs' counsel contended that although the plaintiffs had not at the time of the award the whole fee, yet that having acquired the life

estate of the widow, they had a sufficient fee simple title to convey to the defendants, and having offered such title they were entitled to the money awarded.

The defendants' counsel contended that the award was not properly made: that all the arbitrators were not present or notified at the time of finally determining the matter—particularly as to the costs—that as to title, the widow's estate was in her until 1874, long after the making of the award, and whatever title the plaintiffs had was not the title of the widow at the time of the making the award, but the title of the plaintiffs in their own right, and not as representing the widow: that under 4 Wm. IV. ch. 29, sec. 4, defendants must, within three months, pay the amount of the award or lose their rights, and within that period the plaintiffs must have put themselves in a position to convey or they could not hold the company: that the plaintiffs, acting under the will of the testator, were not within 9 Vic. ch. 81, sec. 30, representatives of the infant, or residuary devisees for the purpose of conveying the remainders, and their legal powers as trustees were not extended by the Act, nor did it make trustees of executors or others who at common law are not trustees. Section 26 gives express powers to deal with estates of infants: 16 Vic. ch. 99, does not apply here, and has not been acted under. The right to pay the money into Court makes it impossible for the plaintiffs to recover under the money counts. The award is not to pay the plaintiffs, but to pay the respective persons entitled; it does not follow the submission, and directs what at the date of the award was not practicable, and the plaintiffs are not in a position to sue as assignees of the widow's interest in the award: that some of the children were of age when the award was made, and the plaintiffs did not represent them.

The plaintiffs, in reply, contended that the infants and the adults were in the same relation to the plaintiffs: that the conveyance of the land sufficiently carried to the plaintiffs the widow's interest in the money, and the award was properly made to the respective persons entitled, as the

arbitrators were merely to value the land, and under 16 Vic. ch. 99, the defendants might have paid into Court any part of the money; and generally, that the conveyances put in were sufficient and the award was sufficient.

The learned Judge was of opinion that the plaintiffs, not having had the title in fee when the award was made, and not having had any power to convey the fee, and the defendants having promptly given notice that they did not intend to take the land, and the widow, tenant for life, having continued in occupation and enjoyment of the land after the defendants' notice and up to the present time, and the widow having, as he would decide from these facts, waived the award (although she not being before the Court he could not decide as against her), the plaintiffs could not, by acquiring the widow's title fifteen months after the award, entitle themselves to sue on it, nor did he think the plaintiffs could convey in fee, as in his opinion neither the will nor the statute enabled them during the widow's life to convey the remainder, they having only a power and no estate under the will. He did not think it necessary to discuss other grounds that might be in the defendants' favour, and he entered a verdict for defendants.

The plaintiffs applied to add the widow as a plaintiff, but the learned Judge refused the application.

The following term, November 18, 1874, *J. R. Martin* obtained a rule to set aside the verdict and enter a verdict for the plaintiffs for $9,000 and interest, on the ground that on the law and evidence the plaintiffs were entitled to recover, and that the learned Judge, who tried the cause without a jury, erred in holding that the plaintiffs, not having the title in fee when the award was made and not having had any power to convey the fee, &c., as already stated above, could not recover in this action.

During Michaelmas term, November 23, 1875, *Robinson*, Q. C., and *Barker*, shewed cause. The defendants were not empowered by any statute to take the proceedings they have done in this case. They could only deal with

the original owners or occupiers of the land, and the plaintiffs are in neither position. They are merely executors of the deceased owner. The subsequently acquired title from the widow does not give them a fee simple, though it purports to do so on the face of the deed. They only acquire her life estate, subject to the contingency of her marrying again. But assuming that the title is good, the plaintiffs cannot succeed, as the award is bad for uncertainty, in not ascertaining the sums to be paid to the several parties respectively entitled to the sum awarded. The delay in perfecting the title, if the deed from the widow has perfected it, would relieve the defendants from being compelled to accept the land. The plaintiffs, it is contended, could not perfect their title after the award was made.

They cited *Mitchell* v. *Great Western R. W. Co.*, 35 U. C. R. 148, 159; *Regina* v. *Cambrian R. W. Co.*, L. R. 4 Q. B. 320, 323; *Leedham* v. *Chawner*, 4 K. & J. 58; *Dart*, V. & P., 5th ed., 447, 448; 9 Vic. ch. 81, secs. 26, 30; 16 Vic. ch. 99, secs. 5, 6, 7; 4 Wm. IV., ch. 29, sec. 3.

J. R. Martin, contra. In 4 Wm. IV., ch. 29, only owners and occupiers are mentioned, but 9 Vic. ch. 81 says that executors, &c., may contract and sell lands. It is not necessary they should be owners or occupiers: *McLean* v. *Great Western R. W. Co.*, 33 U. C. R. 198, 202. The plaintiffs have urged on the proceedings as fast as they could. The widow was no party to the former proceedings and delay, and if we are entitled to the benefit of her title, we cannot be charged with delay. It is contended that the award is perfectly good in all respects. The plaintiffs were at liberty and bound, on its being shewn to them that their title was defective, to make it good by any means in their power. The plaintiffs, having got the widow's title, have a sufficient title in fee simple; and the defendants must carry out the award.

March 17, 1876. MORRISON, J.—I am of opinion that our judgment ought to be for the defendants. The award sued on is one made under the provisions of the statutes

incorporating these defendants. The land in question, it appears, is 50 acres—not land over which the railway passes, nor is it in any way connected with the line of railway, but is situated a considerable distance from it, two farm lots intervening.

I pronounce no opinion whether the land in question is land which the company could take without the consent of the owners, and for which compensation could be awarded under the statutes. The object the company had in view by acquiring the 50 acres was to use the gravel in it for the purposes of their railway.

Proceedings were taken by the defendants as if the plaintiffs were owners or had an interest in the lands under the will of their testator, and arbitrators appointed. The plaintiffs were neither owners nor occupiers of the land; but they were the executors of the will of one Anguish, who in his life time was the owner of lot 1 in the 8th concession of Rainham, of which the 50 acres formed a part, and which lot he by his will devised to his widow for her own use during her life, if she remained unmarried that long, or so long as she remained his widow; and in case she should marry, he directed and authorized his executors (the plaintiffs) to sell and dispose of the farm and invest the price, and to pay unto his wife the third part of the interest yearly as long as she should live: after the death of his wife, as soon as could be done with due regard to the interest of the property, he directed and authorized his executors to sell and dispose of the farm, &c., reserved for the use of his wife, and that the proceeds thereof should be divided among certain of his sons and grandsons, naming them and specifying the amount each should have, and the remainder he divided among the rest of his children in equal shares, and he appointed the plaintiffs to be executors of his will. Some of the devisees mentioned in his will, among whom the proceeds of this land, when sold, were to be divided, are adults and others infants. The widow, at the time of the proceedings and the making of the award, was, and still is, in occupation of the farm and unmarried,

and was no party to the arbitration, and does not appear to have had any notice of it. The award was made on the 29th November, 1872, two of the arbitrators awarding $9,000 as the full value of the fee simple, and they awarded that the defendants should pay to the respective person or persons entitled to receive the same the $9,000 for the land in question. On the following day the defendants, in writing, notified the plaintiffs that they would not assume possession of the lands, and that all intention of occupying the same was abandoned, and that nothing would be done to affect the interests and rights of the plaintiffs or devisees. The defendants never did take or were in possession of any part thereof; and for fifteen months after the making of the award the plaintiffs had no title or estate to or in these lands, and no authority or title in themselves to convey to the defendants the fee simple of the land or to give possession of the 50 acres to the defendants if they so required.

It was conceded that if the plaintiffs had not such a title to these lands as would enable them to convey to the plaintiffs a good title in fee simple, they could not succeed in this action.

I think it is clear that at the time of the making of the award the plaintiffs had no title or estate in the land or any beneficial interest therein. They had only a future power under the will of the testator to dispose of the land in the event of the testator's widow dying unmarried, or in the event of her again intermarrying: *Doe d. Hampton* v. *Shotter*, 8 A. & E. 905. See cases cited in *Sugden* on Powers, 8th ed., 113.

Neither of these events have as yet happened. The plaintiffs were not, therefore, in a position to exercise the power of disposing of the farm. The fact that the widow, the tenant for life, after the making of the award, conveyed her life interest to the plaintiffs, did not authorize the exercise of the power given to the plaintiffs by the will to dispose of the property any more than if she had assigned, her interest to any stranger. By taking a conveyance

from her the plaintiffs only acquired her right, whatever it might be, during her life, and subject to the contingency of her marrying again. Assuming that the plaintiffs were, at the time of the making of the award, in a position to give the title they now offer as one in fee simple, a Court of Equity would not, I think, compel the defendants to accept such a title.

In the case of *Blacklow* v. *Laws*, 2 Hare 40, where an estate was directed by the testator to be sold after the death of his widow, and the sale was made during the life of that person under a decree, some of the persons interested in the proceeds being infants, or not *sui juris*, the Court would not compel the purchaser to accept the title.

The Vice-Chancellor said, at p. 45: "Upon the principal question, I am of opinion, that the sale in the life time of the widow creates such a defect in the title, that a Court of Equity ought not to compel a purchaser to accept it. In order to justify that opinion, I need not deny the power of the Court in any possible case to anticipate the time prescribed in a will for selling an infant's estate. All that I need say is, that a decree anticipating the sale of the estate is a departure from the trusts of the will."

And in *Johnstone* v. *Barber* 8 Beav. 233, a testator devised his advowson to trustees to sell if A. died, and to divide the produce amongst certain persons. A. was the incumbent, so that on his death no sale could be made until the vacancy was made up.

Lord Langdale said, p. 235: "I have nothing to do with the question, whether the sale as proposed will or will not be for the interest of the parties now before me. They are adults, and are competent to act for themselves. If I have jurisdiction to make an order, it must be on the ground that it will be beneficial to the children which the testator's son William may hereafter have; but I am of opinion that I cannot make any such order of reference; for if the master were to report, that it was for the benefit of the parties interested that the advowson should be sold before the death of the present incumbent, I could not act in direct

contradiction to the directions of the will, which it is my duty to carry into execution. If I proceeded on the notion of what might be beneficial to the parties, I would assume a legislative instead of a judicial power."

I also refer to *Mosley* v. *Hyde*, 17 Q. B. 91, 30 Beav. 104, 34 Beav. 107. When the title is subject to doubt, although the Court will not declare it to be a bad title, they will not compel the purchaser to accept it: *Jervoise* v. *Duke of Northumberland*, 1 Jac. & Walk. 559, 568.

In *Hartley* v. *Pehall* Peake 131, which was an action on an agreement to take a public house, a question arose on the effect of a particular covenant in the plaintiff's lease. Lord Kenyon said, "he would not now determine, nor was it necessary to do so, whether this was a binding covenant on the assignee (defendant). He thought it a question of some nicety, but, whether it was or not, he thought it equally a defence to this action. When a man buys any commodity he expects to have a clear, indisputable title, and not such a one as may be questionable, at least in a Court of law. No man is obliged to buy a law suit."

And in *Wilde* v. *Fort et al.*, 4 Taunt. 334, it was held a purchaser was not bound to accept a doubtful title, and that when the vendor did not shew a clear title by the time specified, the purchaser might rescind the contract without waiting to see whether the vendor might ultimately be able to establish a good title, and recover back the amount of his deposit. And I notice in that case, that it being said during the argument that a Court of Equity is at liberty to take notice of facts which take place after the contract, subsequently enabling the vendor to complete his title. Mansfield, C. J., said, p. 341, "And that power is attended with dreadful effects in the delay thereby occasioned."

And in *Curling* v. *Shuttleworth*, 6 Bing. 121, 134, Tindal, C. J., in giving judgment, said: "The rule is, that where upon a sale there is such doubt upon the vendor's title as to render it probable the purchaser's right may become a matter of investigation, the Court will not compel him to

complete the purchase. Here, according to the conditions of sale, the policy was to be sold under a power; the vendors, therefore, should have shewn an unquestionable power, for there are no means of calculating the compensation to be allowed in case of any mistake. Supposing the power to have been only suspended, there may be a candid doubt how far that suspension may be considered to operate in a Court of Equity, and if there be a reasonable degree of doubt, this Court will not expect the purchaser to proceed."

Park, J., said: "I am of the same opinion. We ought not to drive parties into Courts of Equity."

Burrough, J., said: "As to the principal question, if there be reasonable doubt as to a title, we cannot compel a party to take it."

I cannot see upon what principle it can be argued that a mere power to dispose of the lands, in the event of one of two things happening, can be extended to the happening of another event, one not contemplated by the testator, viz., the obtaining by the executors of a conveyance from the widow of her life estate; or that the exercise of the power to dispose of the land could be anticipated by these plaintiffs by a purchase by them of the widow's life estate.

There is only one way in which the widow could accelerate a sale of the lands—that is, by intermarrying again—an act which would deprive her of two-thirds of the yearly value of her life estate. Assuming that the plaintiffs had authority under the will to convey a portion of the lands to the defendants, in the event of the widow's death or her intermarrying again, neither at the time of the company's notice to arbitrate, nor at the time of the making of the award, nor during the three months prescribed by the statute, 4 Wm. IV. ch. 29, section 4, and within which period it is provided that the defendants should pay the amount awarded, and in default of so doing the right of the defendants to assume or take the land in question ceased, and the proprietor would possess his rights, &c., free from any claim or interference by the defendants—it is clear that these plaintiffs during all that time were

not in a position to convey a fee simple title or any title to enforce the award. All this the plaintiffs well knew: neither were they occupiers of the land, and the defendants, discovering they had, through mistake or inadvertence, treated with the plaintiffs, having no right or title to the land, or, as suggested, on account of the exorbitant and excessive amount awarded, promptly notified the plaintiffs that they would not assume or take the lands; the plaintiffs, notwithstanding, fifteen months afterwards obtain a conveyance from the widow, the occupier of the premises, for the fifty acres in question, a portion of her life estate, by a deed conveying on its face the fee to themselves, and having so obtained it, executed a similar conveyance of the lands to the defendants, also on its face a fee simple title, and tender that title in order to entitle them to call for the payment of the $9,000 to them.

In my judgment all that this deed or title could convey to the defendants is whatever title or interest the widow conveyed to them. The conveyance itself does not pretend to be anything more; they had at its date no estate in themselves independent of that deed; it contains no recital, no reference to any other title or interest, or to the exercise of any power by them under the will of the testator.

The title they thus tendered was the mere acquired personal title in themselves of the widow's life estate, and not a title in fee simple, so that, in this respect, on the whole case the defendants were entitled to a verdict on the issue joined on the 10th plea.

Again, the award seems to me to be bad for uncertainty. The arbitrators award and order that the defendants should pay to the respective person or persons entitled to receive the same the sum awarded, $9,000, which they assess and declare to be the full value of the fee simple of the land.

By the 4th Wm. IV. ch. 29 sec. 3, the arbitrators are to award, determine, adjudge, and order the respective sums of money which the company shall pay to the respective persons entitled to receive the same.

And by the Amending Act, 9 Vic. ch. 81 sec. 26, the arbitrators shall award and determine, adjudge, and order

the respective sums of money which the company shall pay the respective persons entitled to receive the same; and that section provides that such amount so awarded the company are to pay to the said several parties entitled to receive the same when demanded.

It is, I think, quite clear from these sections that the Legislature intended that the arbitrators should find and state in their award the respective sums and the respective persons to whom the moneys awarded as compensation should be paid. It is quite clear in this case that the widow was entitled to some portion of the $9,000 as compensation for her life estate, and that other parties were also entitled. The award does not determine or order that any portion of the $9,000 should be paid to the widow or to any other person, or that the whole amount, or that any amount, should be paid to these plaintiffs. I, therefore, see no ground upon which these plaintiffs are entitled to recover the $9,000 or any portion of it in an action on the award. It is not awarded to them. They were neither owners nor occupiers at the time of the award, and they had no estate in the lands, and neither in the notice to arbitrate nor in the award are they treated as such; they are merely referred to as executors of Lewis Anguish, who had been the owner or occupier of the land; and as to their interest in fact, the will and the evidence at the trial shew that they had no estate in the land.

I am also of opinion that this award, as a statutory award, is invalid, and not binding upon the parties interested in the lands and not enforcible by these plaintiffs. To constitute a valid award under the statutes, the arbitration must be one (where the owner, as here, is in occupation) between the company and such owner or occupier, and where such owner or occupier disagrees with the company as to the value of the land required by the company. All the provisions of the various statutes applicable to these defendants in that respect clearly shew this to be the case. See 4 Wm. IV. ch. 29, sec. 3; 9 Vic. ch. 81, sec. 26; 16 Vic. ch. 99, sec. 5. As already stated, these

plaintiffs were neither owners or occupiers and not within the class of persons entitled to arbitrate, as here, and recover compensation.

I also think, assuming that the after acquired title of the plaintiffs enabled them to make a good title, that the delay in tendering a conveyance ought, of itself, to disentitle the plaintiffs from enforcing the award, and that the defendants were not bound to accept such after acquired title, fifteen months after the making of the award, and after the defendants had notified the plaintiffs they would not assume or take the land. To hold otherwise, I think, would be most unreasonable.

We may fairly assume that if the company required the land for the purposes of their railway, they also required immediate possession and title to the same, neither of which these plaintiffs were in a position to give.

In *Heaphey* v. *Hill*, 2 S. & S. 29, where a bill was filed for specific performance of an agreement for a lease, two years having elapsed after the defendant notified the plaintiff (six days after the making of the agreement) of his intention not to perform it, during all which time the plaintiff remained in possession. The Vice-Chancellor dismissed the bill. There the assigned delay was that the plaintiff's attorney had mislaid the papers.

On the whole I am of opinion that the finding of the learned Judge was right, and that the rule should be discharged.

I do not regret arriving at this conclusion, for irrespective of other considerations the amount awarded was most exorbitant. The plaintiffs themselves, at the trial, at the utmost valued the land at $50 an acre—$2,500; while the arbitrators awarded $9,000.

WILSON, J.—I agree in the judgment of my brother Morrison, so far as the findings on the sixth and tenth pleas are concerned.

It is not necessary I should go further at the present time, and say whether—the widow, having given up her life

estate to her executors, in whom the power is vested to sell the land after her marriage or death, and assuming that her conveyance was made and can be construed as a conveyance by which she gave up her interest for the benefit of those who are entitled to the proceeds of the land when it is sold—the executors are now, by reason of that transfer or surrender, as it were, to them of the life estate, together with their own power, in a position to make as good and available a title to the railway company as if the widow had either married or had died.

Nor is it necessary I should say whether the plaintiffs are at liberty to make perfect their title after the making of the award. There is much authority for it.

I merely say that I agree with the finding of the learned Judge upon the issues on the sixth and tenth pleas, and they are sufficient to enable me to deal effectually with the rule.

For the reasons given I agree that the rule should be discharged.

HARRISON, C. J., was not present at the argument, and took no part in the judgment.

Rule discharged.

BOLAND V. MCCARROLL.

Seduction—Agreement for settlement—Construction — Non-payment of the sum agreed on—Revival of right to sue—Penalty.

To an action for the seduction of plaintiff's daughter, the defendant pleaded, on equitable grounds, that the plaintiff and his daughter had entered into an agreement under seal with defendant for the settlement of the suit, and other mattters (setting it out), by which the amount to be paid by defendant was fixed at $120, which the defendant agreed to pay by instalments of $15 at the times specified; and it was stipulated that if defendant should not make these payments punctually the agreement should be void. The plea then set out that defendant paid three instalments, but by accident omitted to pay the fourth, which he was ready and willing to pay; and he submitted that the proviso to avoid the agreement on non-payment was, on the true construction of the agrement, a penalty only, against which he should be relieved, and if not, that it differed from the intention of both parties, and should be reformed. The attorney who drew the agreement, said that he put in this proviso of his own accord, without instructions to do so, but that it was read over to the parties, and executed in duplicate, each party taking one.

Held, that there was no ground for saying that the proviso was introduced by mistake: that it was not a penalty against which defendant should be relieved, being a reservation only of an existing legal right; and that it formed no defence therefore to this action.

ACTION for the seduction of Christina Boland, the plaintiff's daughter.

Pleas, 1: not guilty. 2: That the said Christina Boland was not the daughter and servant of the plaintiff.

Third plea, on equitable grounds: that after the causes of action had accrued, and before the commencement of the suit, the plaintiff and Christina Boland his daughter entered into an agreement with the defendant for the settlement of the causes of action in the declaration mentioned, and certain other matters whereby the damages sustained and payable, and the amount to be paid by the defendant to the plaintiff and his daughter in respect of all claims by them, and each of them, on account of the said causes of action, &c., were mutually ascertained and fixed, and agreed upon at the sum of $120, which they agreed to accept, and defendant agreed to give his covenant for the payment of the said sum by instalments, &c.: that in pursuance, &c., an instrument under their hands and seals was executed as follows:—Articles of Agreement made and entered into, in

duplicate, this 10th day of September, 1874, between Michael Boland, &c., and Christy Boland, his daughter, of the first part, and Robert McCarroll, &c., of the second part.

Whereas, the said Christy Boland, on or about the 1st of June last was delivered of a child, which she alleges was begotten by party of second part; and whereas legal proceedings have been commenced by said Michael Boland against defendant; and whereas, in order to prevent further scandal concerning the said matter, &c., witnessed that the parties of the first part covenanted and agreed to refrain from taking legal proceedings of any kind, &c., against the defendant on account of the birth of the child, maintenance, or any other thing connected with the said child, from the time the said child was begotten, &c., and that the said plaintiff thereby agreed to desist from prosecuting the defendant and to take the suit now commenced out of Court paying all expenses incurred by the same; and the defendant agreed to pay the said Christy Boland $120 in consideration thereof, that is to say, $15 on the execution of the instrument, $15 on the 10th December, March and June next, and the balance of $60 on the 10th June, 1876. And it was mutually agreed that the settlement should be final between the parties as regards the mother of the said child, and that the parties shall abandon forever all claims of any kind which they may or shall have against the defendant as regards said child. And it was further mutually agreed that if the defendant should not pay punctually the payments as above named, to the said Christy Boland, then the agreement should, to all intents and purposes, be null and void. The plea then set out that, upon the execution of the instrument, it was delivered by the defendant to the plaintiff and the said Christina Boland, and accepted by them in full satisfaction and discharge of the plaintiff's claim: that the defendant duly paid the first three instalments: that by accident and inadvertence he omitted to pay punctually the instalment due on 10th June, 1875: that he was ready and willing to pay, &c., the overdue instalment. The plea then submitted that under the agreement the causes of action in the declaration were released, and extinguished,

and upon the true construction the proviso that if the defendant should not pay punctually the payments therein named, the instrument should be null and void, was, and is, a collateral security merely for the payment of the moneys, and that upon payment of the moneys therein mentioned, and upon payment of the over due instalment and interest, the said security ought to be declared in abeyance, and all proceedings stayed. The plea further submitted that in any event the said proviso constituted in equity a mere penalty or pledge for securing the payment of the said moneys, against the forfeiture of which the defendant was entitled in equity to be relieved: that the intent and meaning of the parties, and the true agreement between them in reference to the proviso was, that the same should constitute a penalty for the said payments merely, and that in case the instrument is not in accordance with the said agreement, the same so differs therefrom and from what was intended by them through mutual error and mistake of all the parties thereto, and the defendant submitted that he is entitled in equity to have the same reformed so as to conform to, and express such true intent and meaning, and that it is inequitable for the plaintiff to seek to enforce the proviso.

Upon this plea issue was joined.

This action was tried at Goderich Fall Assizes, 1875, before Hughes, County Judge, sitting for Richards, C. J.

On the trial, it appeared from the evidence of the daughter that the payment in question was not paid nor offered to her by the defendant or any one until after this suit was brought.

The defendant was examined for the defence, and he stated that when arranging the settlement he did not agree that if he failed in payment of the instalments this suit might be brought, or that such a condition was exacted if he did not pay promptly: that he did not understand the meaning of the words null and void: that it was not explained to him by Mr. Johnson, who drew the instrument, although no doubt he read it over well enough to him.

A statement was put in as to what Mr. Johnson, who was a barrister, would have testified if he was present, viz.: to the effect that after the amount to be paid and the times appointed for payment were agreed on by the parties, who were all present, that he was instructed to draw an agreement accordingly: that nothing was said about the agreement being terminated if the money was not punctually paid: that the bargain was not that if the money was paid punctually they would accept it in discharge; but merely compensation fixed, and the periods for payment mentioned: that Mr. Johnson put in the proviso or defeasance of his own accord, as he thought it was necessary to have some security for punctual payments, and he accordingly inserted it, and that it was read over to the parties and executed.

The learned County Court Judge was of opinion that the agreement set forth more than what was agreed between the parties, and that it was not in contemplation between them that the original cause of action should be resorted to if the defendant did not pay punctually the instalments particularly that a new action should be brought, and that, in his opinion, the plaintiff should rather have proceeded, with the original action which was agreed should be taken out of Court; and that the clause in the agreement was a mere penalty attached to the non-fulfilment of its conditions by the defendant, and he gave judgment for the defendant on the equitable plea. The other issues as to the seduction were found in favour of the plaintiff and $75 damages, and the verdict was entered accordingly.

In Michaelmas term, November 17, 1875, *Robinson*, Q.C., obtained a rule to set aside the verdict for $75, or for the plaintiff to deliver over the *postea* to the defendant, and the Master to tax to the defendant his general costs in the cause, on the ground that the verdict being for the defendant on the plea going to the whole cause of action, there could be no damages for the plaintiff.

In the same term, November 16, 1875, *Bethune* also obtained a rule to enter a verdict for the plaintiff on the

equitable plea, on the ground that the defendant on the evidence was not entitled to a verdict on it; or that judgment *non obstante veredicto* be entered on that issue, on the ground that the equitable plea shewed no ground of equity entitling the defendant to be relieved from the cause of action in the declaration.

During this term, February 22, 1876, both rules came on for argument together.

Bethune, for the plaintiff. The plaintiff's rule should be made absolute, as the equitable plea is not sustained: *Thompson* v. *Hudson* L. R. 4 H. L. 1; *Story* Eq. Jur., 10th ed., vol. i. secs. 89, 101, 105, 109; *Kerr* on Frauds, 330 et. seq.; *Joyce* on Injunctions, vol. i., p. 55, 56, 57, 79, 82, 91; *Ford* v. *Earl Chesterfield*, 19 Beav. 428, 431.

Robinson, Q. C., for defendant: The plea is an answer and is sustained by the evidence. If the agreement does not clearly express the intention of the parties this Court can reform it: *Brown* v. *Blackwell*, 35 U. C. R. 239. As to the construction which equity would put upon the contract, he referred to *Taylor* Eq. Jur. 456, 457. The plea is good by way of accord and satisfaction. See *Sleeman* v. *Waterous*, 23 C. P. 195; *Addison* on Contracts, 7th ed., 206; *Williams* v. *Rawlinson* 3 Bing. 78; *Chitty* on Contracts, 10th ed., 95.

March 17, 1876. MORRISON J.—After an examination of the evidence taken at the trial, I see no ground for saying that the introduction of the proviso in question was a mistake; it is not disputed that the proviso was in the agreement when executed, and it is admitted by the defendant that it was read to the parties by Mr. Johnson, who drew the agreement, and before it was executed by them.

Independent of this, the agreement was made in duplicate, and each party had one, and the defendant has so far ratified it, that he acted upon it. I do not think he ought now to be heard to say that the proviso was a mistake, because he now says there was nothing said when he agreed with the plaintiff's daughter to pay the $120, that the agreement should be terminated if the money was not

punctually paid, and because he now thinks the effect of the proviso may be prejudicial to him.

The words of the proviso are not ambiguous, they are clear and certain.

As said in *Powell* v. *Smith*, L. R. 14 Eq. 85, the only thing that was not understood was, perhaps, the legal effect of the words of the proviso, and as said in that case, that is no ground of mistake, it is a question upon the construction of an agreement agreed to by all the parties concerned.

As said by Lord Justice Knight Bruce, in *Bentley* v. *Mackay*, 31 L. J. Ch. 697 at page 709 : "I take this to be the rule in the ordinary case of rectifying mistakes in an instrument, where it is sought to alter the instrument in any prescribed or definite mode, and for this reason—that in such cases it is necessary to prove, not only that there has been a mistake in what has been done, but also what was intended to be done, in order that the instrument may be set right according to what was really so intended; for in such a case, if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument."

If, however, there was in fact a mistake, so far as the defendant was concerned, that would only be a ground of setting aside the agreement, which would leave the defendant in the position where the plaintiff contends he now is. Neither do I see any grounds for reforming the instrument on the ground of a mutual mistake, or that there was any intent or meaning to be given to the words of the proviso other than what may be its true and legal construction.

Evidence was given to shew that when the parties agreed upon the payment of the $120, and that the arangement should be reduced to writing, nothing was said about such a proviso being inserted, and it was contended that such a proviso was not in contemplation.

In one sense I can understand that to be the case, for in nine cases out of ten on the treaty for an agreement the various clauses, provisoes, or stipulations that are afterwards

inserted in the formal written instrument are seldom then referred to, but are generally suggested to the parties, or inserted by the professional gentleman who is employed to draw it up, and it is for the parties who are to execute the agreement, after being read over to them, to say whether they object to any of the terms it may then contain.

It is not likely that any of these parties contemplated that the agreement should be one under seal, or knew its effect as a deed, yet still it was sealed.

The proviso in question is one quite consistent with the agreement made between the parties, one that the plaintiff might reasonably have required to be inserted to carry out what apparently he had in view, and was the motive for his joining in the agreement, viz.: the punctual payment of the moneys which the defendant agreed to pay his daughter —he himself was to derive no pecuniary benefit under the agreement. He had brought an action of seduction against the defendant; the defendant was desirous of having the action stopped, and of arranging with the daughter towards the maintenance of the child; the plaintiff was willing to assent to any agreement they might make; the defendant then agreed to pay her $120, by instalments, as mentioned in the agreement, and the plaintiff agreed to discontinue the action, and to abstain from enforcing whatever right of action he had, and for that purpose to be a party to the agreement; and upon the agreement being reduced to writing the stipulation in question was inserted, whether suggested by the solicitor who drew the agreement or not, it was inserted, and read over to the parties before execution.

As I have said, it was a reasonable proviso, one that the plaintiff had a right to require, viz.: that if the defendant did not punctually pay to his daughter the moneys he agreed to do, that he, the plaintiff, should be remitted to his former rights as if he had never executed the agreement. He could properly say it is only on that condition that I will agree to abstain from enforcing my right of action.

It was pressed that if the proviso had the effect the plaintiff contends for, it would be hard, after the defendant

had partly fulfilled his agreement, that on his making default in one payment the right to bring this action revived.

The question of hardness, or otherwise, can have no effect upon the agreement.

There is still the main question, whether this proviso, as pleaded and argued, is in effect a penalty, and against which the defendant might be relieved, and I am of opinion that it is not.

In the case of *Thompson* v. *Hudson*, L. R. 4 H. L. 1, the subject of a penalty, and the effect of a stipulation somewhat similar to the one now in question, is discussed and considered at length.

The Lord Chancellor (Lord Hatherley) in stating the law said, at p. 15: "It is perfectly competent to a creditor to say: "If the payment be not made *modo et formâ* as I have stipulated, then forthwith the right to the original debt reverts, and it is open to me to proceed with reference to the original debt, and to exercise all those powers which I possess for compelling payment of the original debt; in other words, I am entitled to be replaced in the position in which I was when this agreement, which has now been broken, was entered into.' "

At page 26, he says: "But whether it was a hard bargain or not, they made their bargain with him, which he on his part entered into, that under certain conditions he should be entitled to say that a less sum should be received by the appellants, his creditors, than would be otherwise due to them, but he still remained liable for the original debt if he was not able to fulfil the arrangement by the payment of that lesser sum. There is no penalty, no forfeiture, nothing of the kind, but simply a provision that upon the terms upon which the indulgence is granted not being complied with, the original rights shall be preserved, and that the creditors shall be entitled to avail themselves of those rights."

And Lord Westbury said, at p. 27, that the appellants, before the Master of the Rolls, "thought that it was very rational and very right for a creditor to say to his debtor,

'Provided you pay me half of the debt, or two-thirds of the debt, on an appointed day, I will release you from the rest, and will accept the money so paid in discharge of the whole debt; but if you do not make payment of it on that day, then the whole debt shall remain due to me, and I shall be at liberty to recover it.' If you were to put that proposition to any plain man walking in the streets of London, there can be no doubt at all that he would say that it is reasonable and accordant with common sense. But if he was told that it would be requisite to go to three tribunals before you could get that plain principle and conclusion of common sense accepted as law, he would undoubtedly hold up his hands with astonishment at the state of the law. The Master of the Rolls appears to have thought that the residue of the debt in the case I have put would be converted into a penalty, and that the penalty could not be enforced. It is impossible to hold that money due by contract can be converted into a penalty. A penalty is a punishment, an infliction, for not doing, or for doing something; but if a man submits to receive, at a future time and on the default of his debtor, that which he is now entitled to receive, it is impossible to understand how that can be regarded as a penalty."

And referring to the argument of counsel, who pressed that if the larger debt was to arise on the breach of several stipulations, and one of these stipulations may be the default of the debtor in a minor and immaterial point, then the entire debt arising upon such trifling default must assume, in the eye of the law, the character of a penalty, and not of a debt, and citing the well known case of *Kemble* v. *Farren*, 6 Bing. 141—Lord Westbury, referring to that case, says, p. 30: "But the penalty and the liquidated damages in that case were not an antecedent debt due upon a contract for valuable consideration, but were a conventional sum put in by the parties, plainly for the purpose of securing the performance of the agreement contained in the engagement between them. There is, therefore, nothing at all corresponding to

the case where the creditor says to the debtor: 'If you pay me punctually on a given day a smaller sum of money I will take it in discharge of the whole, but if you fail in doing so, my title to the original debt shall in no respect be prejudiced by the agreement.'"

And Lord Colonsay put the point clearly. He said at p. 33, "I cannot understand that it is to be regarded as a penalty. It is a reservation of an existing right. It is not the emergence of a right that never had any existence at all except on a violation of the agreement which was made. It is merely the reservation of what is the just and honest right of the party, which he was willing to waive to a certain extent, provided his debtor would do certain things, but if the debtor fails in doing these things, then that right which belongs to the creditor shall continue to belong to him, and he may enforce it."

And Lord Colonsay refers to the argument of counsel, that upon the true construction of the agreement, and a clause in a mortgage &c., it never was intended that the right should be enforced, and said, as to such circumstances at p. 34: "It cannot render nugatory the reservation clearly expressed in the conclusion of the deed, that the full rights of the parties shall be reserved."

It seems to me that the principles enunciated in these judgments are applicable to this case. The defendant agreed to pay to the plaintiff's daughter certain moneys on certain specific days, and the plaintiff agreed to desist from prosecuting a suit he had commenced against the defendant, and to refrain from taking further legal proceedings in respect to the birth of the child in question, subject to this mutual agreement or proviso—that if the defendant should not pay punctually the payments mentioned to the plaintiff's daughter the agreement should, to all intents and purposes, be null and void: in other words, that on such default the plaintiff should be remitted to his original right to prosecute his suit he so conditionally agreed not to enforce. He submitted to refrain from what he was entitled to do, his right to sue remaining an existing right,

the exercise of which in effect was postponed until default by the defendant, and extinguishable by the defendant performing his agreement. Such being the effect of the agreement, applying the reasoning of the judgments of the Lords in *Thompson* v. *Hudson*, L. R. 4 H. L. 1, there is no penalty, but, as the Lord Chancellor said, simply a provision, that upon the terms upon which the plaintiff agreed to refrain from taking legal proceedings not being complied with, the plaintiff's original right to bring this action was preserved.

On the whole, I am of opinion that the verdict should be entered for the plaintiff on the equitable plea.

It is satisfactory to see that the damages, $75, given by the jury, is just the amount due by the defendant under his agreement.

The plaintiff's rule will, therefore, be absolute to enter the verdict for him on the third plea, and that the defendant's rule be discharged.

HARRISON, C. J., and WILSON, J., concurred.

Plaintiff's rule absolute.
Defendant's rule discharged.

BAKER ET AL. v. LYMAN ET AL.

Sale of goods—Order misunderstood—Delivery of the wrong article.

The plaintiffs, who were potters at Peterborough, sent an order to defendants at Toronto, for $9 worth "of stone, spar such as potters use." Defendants answered acknowledging the receipt of the money, "which we have placed to your credit for stone." The order was entered in the order book as for stone, but defendants' manager crossed it out, and wrote ground flint, thinking that must be what was meant, though he said he might as well have sent Cornish stone. The evidence shewed that spar or feld spar was a substance used in the United States for the same purposes for which stone or Cornwall stone is used in England. The flint was sent in a barrel, which the defendants said was marked flint, and the railway receipt to them was for "one barrel flint." The station master at Peterborough entered it from the way bill as *one barrel fluid*. The plaintiffs alleged that the barrel was not marked "flint:" that the railway notice described it as fluid: that they received and used it assuming it to be stone as ordered, there being nothing in the appearance to distinguish it, and they having before got stone from the defendants. Being thus used instead of stone it destroyed the plaintiffs' ware, and for this the plaintiffs sued.

The jury were directed that defendants were liable if the order sent by the plaintiffs should have been understood by defendants as an order for Cornwall stone, and if the plaintiffs were justified in believing that the article sent was, and did not know that it was not, such stone; but that if defendants were justified in sending ground flint on the order received they would not be liable—and they found for the plaintiffs $150.

Held, reversing the judgment of the County Court, on which a nonsuit had been afterwards ordered, that the direction was right, and that the verdict should have been upheld; and that it was not a case in which the parties' minds were not *ad idem*, so that no agreement had been made.

APPEAL from the County Court of the county of Peterborough.

The declaration states that the defendants were wholesale druggists and vendors of certain merchandise called stone, used by potters in the manufacture of pottery; and it was agreed between the plaintiffs and defendants that the defendants should sell to the plaintiffs nine dollars worth of stone, to be shipped to the plaintiffs, to be paid for by them in cash; and although the period for delivery of the stone had elapsed before the commencement of the suit, and the plaintiffs had been always ready and willing to receive the same, and had paid for the same before the commencement of the suit, and had in all respects performed the agreement on their part, yet the defendants

disregarded their promise; and although they did, after the making of the agreement, deliver to the plaintiffs, in alleged and pretended part performance of their promise, a certain quantity, to wit, one barrel of certain merchandise exactly resembling in appearance the said article called stone, as and for the said stone so agreed to be delivered, and the plaintiffs then relying on their said promise, received the same as and for stone, and did also pay for the same in cash, yet the defendants craftily and knowingly deceived the plaintiffs in this, to wit, that the merchandise so delivered by the defendants was not, nor was any part thereof, stone; but, on the contrary thereof, was a certain other article, to wit, flint, exactly resembling in appearance the said article called stone, but of different properties, qualities and uses, as the defendants before and at the time of the delivery thereof well knew; and the plaintiffs, confiding in the promise of the defendants, used the said flint in their said business as potters instead of stone, believing the same to be stone, whereby two kilns of pottery made by the plaintiffs were destroyed and made useless and of little value, and the plaintiffs, in the making and burning of the said pottery, were put to great cost, inconvenience, and loss.

Pleas: 1. Defendants did not promise.

2. The plaintiffs did not rely upon the alleged promise of the defendants and receive the said flint as and for stone.

3. The defendants did not deliver to the plaintiffs, in alleged and pretended part performance of their alleged promise, a certain quantity, to wit, one barrel of certain merchandise exactly resembling in appearance the said article called stone.

4. The defendants did not deceive the plaintiffs in manner and form alleged.

Issue.

The cause was tried at the County Court sittings, held before last Trinity term, when the plaintiffs were nonsuited.

An appeal was brought and argued before this Court in Trinity term, when the appeal was allowed, and the rule

ordering the nonsuit was directed to be set aside, and that a new trial should be granted, and that the costs of that trial and of the motion in the Court below against the plaintiffs' verdict should abide the event of the cause.

The cause had been tried a second time and a verdict rendered for the plaintiffs, and a nonsuit again entered by the learned Judge, against which the plaintiffs again appealed.

The evidence material to be considered is as follows. For the plaintiffs:—

Henry Baker, one of the plaintiffs, said:—The flint came in a barrel by railway. We used it in pottery, taking it to be stone, and mixed it with flint. We had no doubt it was stone we got from defendants. *Flint* is never called by any other name. *Stone* is sometimes called "spar," "feld-spar," and "Cornwall stone." Got once before stone from defendants.

In *cross-examination*—We sent for stone. Never heard of "stone-spar": should not know what that was. We use flint and stone in glazing. Stone and feld-spar are used the same: it is got in different countries. The head of the barrel was not marked flint.

Wm. Bell, a druggist, said:—The plaintiffs requested me to order goods. I wrote for them the following letter:

PETERBOROUGH, 9th January, 1875.

Messrs. Lyman Bros., Toronto.

GENTLEMEN,—Please send down to Peterborough nine dollars worth of stone spar such as potters use. I think you have sent some before, and address it to Messrs. Baker & Davey, Pottery, Peterborough. You will find $9 enclosed. Send, as usual, by rail.

Yours respectfully, W. BELL.

I got receipt from defendants for $9 for stone, as follows:

TORONTO, 11th January, 1875.

Mr. Wm. Bell, Peterborough.

DEAR SIR,—We beg to acknowledge receipt of your favour of the 9th inst., enclosing nine dollars, which we have placed to your credit for stone, to be sent to Baker & Davey.

With thanks, we are, yours very truly,

LYMAN BROS. & Co.,

Per M. Lilley.

I saw the barrel when it came. I weighed it. *Flint* was not marked on the end I saw. I think—could not swear positively—I saw the address. In *Tomlinson's* Encyclopædia spar includes flint. *Flint, feld-spar,* and *Cornwall stone,* are all different materials and different varieties of flint.

Wm. Davey, a plaintiff, said: The material which came was flint. I examined the barrel when it came for the mark carefully. It was not marked either flint or stone. We used it for stone. We were guilty of no carelessness in using flint. I had no doubt it was stone we got from defendants. *Stone* is called feld-spar or Cornwall stone; *flint* is called only flint. [Head of barrel produced.] There never was any painting on it. It is usual to mark the barrel, so I looked carefully, as it is customary to be marked.

Cross-examination—The card on the barrel contained the address. I saw no painting of black letters. I saw the invoice. It read "fluid" in it. I cannot find it. Cornish stone and feld-spar are the same. I mean I saw the railway notice with charges, not the invoice. I threw the bill away.

Wm. Brownscombe, said: Flint is never called anything else. Feld-spar answers the same purpose as Cornish stone; there is very little difference. *Stone* means Cornish stone *Spar* called feld-spar is got in the States, Cornish stone in England. They are articles well known in trade, and used largely by white potters. They are articles of merchandise. I should use flint for stone if I got flint when I sent for stone. By "stone spar" I would understand stone *or* spar. Flint mixed with flint would destroy ware.

Cross-examination—I could not tell the one from the other, stone or flint. Feld-spar comes from the States Cornish stone from England. They are used for the same purpose.

Rowley—I work at Beaverton pottery. I remember the sample sent by plaintiffs to be tested. I understood it was stone. I tried it as such, and the result showed it was flint. If I had sent for stone I would have used it as stone. I

never knew any names but *flint* and *stone*. Never heard of feld-spar until I came to this country. Know nothing of *spar*. I would not put in the word *spar* in an order for stone.

A. Finlay, educated at the Royal School of Miners, London—engaged in teaching science and chemistry—said: *Spar* is applied to crystalized metals. Flint is not a spar. Feld-spar and Cornish stone are identical as potters apply them.

Robert Westcott said: Feld-spar is substituted for Cornish stone. Cornish stone is known as stone; spar as feld-spar. I would not understand flint in either case.

Cross-examination — I would not have given such an order as sent from plaintiffs to defendants.

For the defendants:

George Massey—Manager for defendants in Toronto for 18 years—said: Bell's letter was entered by a clerk in the order book literally. He referred to me to state how the order was to be filled. On examining the order book, it shewed an order put in for *stone*. I crossed that out and wrote *ground flint*. I did so because I thought *stone* must require and mean flint, after consulting the warehouseman. I might just as well have sent Cornish stone. I shipped it as ground flint. I marked it. Always marked barrels with a mixture of turpentine and lamp-black by a brush. Railway receipt, produced, marked "one barrel flint." Invoice was: 400 lbs. ground flint, 2¼, $9, paid.

Cross-examination—A copy was sent to plaintiffs. We have no stuff known as feld-spar; but, I believe, from reading, it is about the same as Cornish stone, which we keep in stock. It is never called stone. I do not know if ground flint is a spar or not. Plaintiffs' order did not order anything we know. Potters don't use feld-spar.

Curry, warehouseman of defendants, said: I sent ground flint to the plaintiffs; the barrel was marked "*Flint*, Baker & Davey." I have been there 35 years. I put on mark always with black paint and what it contains.

Gladman, station master at Peterborough, said: The

entry on the book is "one barrel fluid." It is copied from the way bill. In the course of business, I would advise plaintiffs of receipt of barrel of "fluid," with bill of charges. On examining way bill, cannot say if way bill is *flint or fluid.*

The learned Judge directed the jury that the plaintiffs complain that while they ordered one article, which in the declaration they call spar, the defendants sent them another article called flint, which the plaintiffs say had the effect of spoiling two kilns of pottery, for which they claim $150 damages.

The defendants say the plaintiffs' order was not for *stone*, but was properly interpreted an order for ground flint, and was so fulfilled; and they say they never sold to the plaintiffs anything else but the barrel of flint which the plaintiffs got.

"I think the defendants are liable if the order sent by Bell, as agent of plaintiffs, should by them as men of business have been understood as an order for Cornwall stone, and that the plaintiffs were justified in considering when they received the barrel that it was Cornwall stone, or unless they knew or had reason to believe that it was not Cornwall stone. If the defendants were justified in sending a barrel of ground flint on the order received from Bell, they cannot be liable to the plaintiffs for any damages. Mr. Scott objects that I should have instructed the jury that if the plaintiffs were guilty of contributory negligence they could not recover."

Verdict for plaintiffs: damages, $150.

A motion was afterwards made to enter a nonsuit, and in disposing of the rule and making it absolute, the learned Judge said:—

"As to entering a nonsuit, the first ground taken is, the defendants having understood the order in a sense different from what was intended by the plaintiffs: there was no contract, common consent being wanting; and the second ground is, there was no warranty on the part of the defendants shewn or proved. As my judgment turns on these

points, the other grounds I need not set out. At the trial I was much embarrassed, having on a previous occasion nonsuited the plaintiffs, which judgment, on appeal, the Court of Queen's Bench had set aside and ordered a new trial (*a*), but on what ground or grounds I had no information, and without such knowledge, and being still left in the dark, I can only again use my own judgment in disposing of this rule, which I would gladly avoid if I only had sufficient light to enable me to bow to the decision of the Superior Court."

The learned Judge then referred to *Leake* on Contracts, 16, 178, 179, to the effect that a variance between the offer and acceptance of it, caused by the use of an ambiguous term, so that each party is using it in a different sense, may be relied on for the purpose of shewing that no agreement was ever come to between them, and that a patent ambiguity, if incapable of a rational interpretation, to that extent invalidates the agreement ; and he referred to *Chanter* v. *Hopkins*, 4 M. & W. 399, 405, 406 ; *Riley* v. *Spotswood*, 23 C. P. 318, and to the case of *Smith* v. *Hughes*, L. R. 6 Q. B. 597, there cited in support of that principle. Then the learned Judge proceeded : "After considering these cases and the evidence I have set out I can come to no other conclusion than that the evidence fails to establish the plaintiffs' case, and that the plaintiffs and defendants' minds on the matter of the order were not *ad idem*, and my opinion is confirmed that the evidence should not have been left to the jury."

Then the learned Judge referred to some cases which shew when there is or is not a sufficient case made out to be left to the jury; and accordingly he made the rule absolute for a nonsuit.

In this term, February 14, 1876, the appeal was argued by *Osler* for the plaintiffs, appellants. Many of the cases applicable here are referred to in the judgment of the Court below. The case was one for the jury, and they found the facts to

(*a*) In this case the appeal was allowed without costs, judgment being given orally on the close of the argument.

be as the plaintiffs represented. They determined that the plaintiffs asked for stone, and it is admitted by the defendants that they sent flint, which was never ordered, and they must have found that the plaintiffs used the flint sent to them thinking it was stone such as they had ordered. The learned Judge should not, therefore, have interfered with their finding. He referred to *Benjamin* on Sales, 2nd ed., 323, 326; *Smith* v. *Hughes,* L. R. 6 Q. B. 597; *Raffles* v. *Wichelhaus,* 2 H. & C. 906; *Allan* v. *Lake,* 18 Q. B. 560; *Bridge* v. *Wain,* 1 Stark. 504; *Wieler* v. *Schilizzi,* 17 C. B. 619; *Jones* v. *Bright,* 5 Bing. 533; *Chisholm* v. *Proudfoot,* 15 U. C. R. 203. The case of *Campbell* v. *Hill,* 23 C. P. 473, shews what evidence is required to make a proper case for the jury. *Mullett* v. *Mason,* L. R. 1 C. P. 559, shews the damages awarded here were rightly given. See also *Smith* v. *Green,* 33 L. T. N. S. 572.

Maclennan, Q. C., contra. Whether there was a case for the jury or not was for the learned Judge to determine, and he rightly determined upon the evidence that the plaintiffs should not have recovered, and could not according to the authorities retain their verdict. The article ordered by the plaintiffs, "stone spar," was not known in the trade—there is no witness who says there is such an article, and some of them say they do not know what it means. The defendants did not know either. They exercised their best judgment in good faith in sending down the flint, which they believed was what the plaintiffs required, and which the defendants knew that the plaintiffs did use in their business of potters. The question is not now whether it would have been prudent or better for the defendants to have written to the plaintiffs to discover what it was they wanted, because this is not an action for damages for a wrong, but an action for an alleged breach of contract, and the only enquiry is whether the defendants ever contracted as the plaintiffs assert they did. It is plain they did not. The plaintiffs ordered something which neither they nor the defendants nor any of the witnesses knew anything of. The defendants sent them another article, believing it to be

what was desired by the plaintiffs. There was, therefore, no contract between them: *Raffles* v. *Wichelhaus*, 2 H. & C. 906, and the cases already mentioned, shew that. The damages are excessive, because if the defendants were to blame the plaintiffs brought about their own injury by using as stone an article which on the invoice, bill of lading, and on the barrel was marked and described as flint, and because the damages of injury to the kiln of pottery-ware, in which ware the flint was used, are too remote. The plaintiffs, if entitled at all, can only recover the price they, paid for the flint, $9, and no more.

March 17, 1876. WILSON, J.—In my opinion this case can be determined without going very minutely into the cases which were cited, although we shall have to refer to them as authorities which maintain the conclusion we have come to.

In this case, as in many others, it is not the law which is uncertain, it is that the facts are not sufficiently grasped, or are not clearly comprehended.

The plain statement of a case will often go more than half way towards its solution.

The difficulty here is, that it is said the plaintiffs gave an order for an article on the defendants which was not known to the trade, and which they did not know themselves by such a name, nor did the defendants, nor did any other witness who was called; and the defendants assumed to fulfil that order by sending something which in no way or sense was a compliance with the order, but which they guessed might be the commodity the plaintiffs required.

It appears that the article *stone* which the plaintiffs really wanted resembles very much in appearance the *flint* which the defendants sent, and the plaintiffs thinking they had got what they wanted used it and so caused the damage to their pottery for which they now sue.

The defendants say the plaintiffs knew, or should have known, there was no such article as "stone spar" which they ordered, (I assume at the present that it was "stone

spar" they wrote for,) and although the defendants sent a wholly wrong article, that they had nevertheless described it in their invoice and on the barrel as *flint*, and that the railway notice to the plaintiffs was also *flint* or *fluid*, but certainly not stone; and as the plaintiffs do use *flint* in their trade as an article for different purposes than they use stone for, they were fully informed before they used the flint that it was flint and not stone, and so they carelessly if not wilfully brought about their own injury.

That argument, if correct upon facts sufficient to sustain it, would have the effect of reducing the damages to the mere price of $9 and railway charges which the plaintiffs paid for freight at the most, or to a merely nominal sum if the plaintiffs, as they did, actually used the flint sent to them knowing or properly having the means of knowing from the means before mentioned the nature of the article they were using.

I shall dispose, in the first place, of the matters relating to the communication to the plaintiffs as to the article sent to them being flint. Had they such a communication by invoice, railway notice, or mark upon the barrel?

I am of opinion, on the evidence, that it is not shewn the barrel was marked flint as represented. The jury must have been of that opinion, and it is impossible to say they were not warranted in so thinking.

An invoice was sent by defendants to the plaintiffs; that invoice described the article as ground flint. It does not appear they received it, although one would be disposed to think they must have got it.

A railway notice with the bill of charges was sent by the railway company to the plaintiffs. Davey, one of the plaintiffs got it. He said that the article was described as *fluid*. He threw the bill away. The station master said from his book he would have advised the plaintiffs of his having received for them one *barrel fluid*.

It cannot be said the plaintiffs had no notice that stone was *not* sent to them. It is possible they had notice that *flint* was sent to them. It is certain they were informed a barrel *fluid* was sent to them.

They knew, of course, the article was not a fluid.

Did they then know it was *flint* or *not* stone, or had they such means of knowing the fact that their omission to attend to it was evidence of carelessness or neglect on their part?

These were certainly matters of fact for the jury, on which the whole evidence would have to be considered. Firstly, the order was for *stone* as the plaintiffs say, and they would reasonably and naturally expect to receive *stone*. Secondly the defendants' receipt of the 11th of January to Mr. Bell, who actually penned the order for the plaintiffs, described the article as "stone to be sent to Baker and Davey." Thirdly, although the invoice described the article as *flint* and the plaintiffs saw it, they might have thought it a mistake of the defendants, especially after the defendants had described it in their receipt to Mr. Bell, the plaintiffs' agent in this matter, as stone, and after the railway bill had described it as *fluid*. Fourthly, the evidence shewed that from the appearance of the article which the plaintiffs got they could not tell it was not stone, and they thought it was stone. And fifthly, they had got stone from the defendants before this occasion.

Upon these facts it was for the jury to determine whether the plaintiffs had or had not any plain intelligible notice that the article which the defendants had sent to them was *not* stone, or was *flint*; or whether they knew or should have known that the article sent was not stone, so as to charge them with neglect or carelessness in the subsequent user of it in their business.

And we have no doubt, as this was the second trial, and as the cause has been so vigorously prosecuted and defended that everything, although it may not all appear and cannot be expected to appear upon the notes of the trial, was urged upon the attention of the jury by the counsel for the respective parties which could in any way be serviceable to their clients, and that everything which was presented to the jury was duly considered by them before they gave their verdict.

A verdict in favour of the plaintiffs then upon such facts and circumstances cannot be said to be an improper one.

These matters being cleared out of the way, we come to the principal subjects of controversy. What was it the plaintiffs did order, and was there ever a contract entered into upon the order between the parties?

The order was for "stone, spar such as potters use."

The plaintiffs say the actual order, and so the case reports it, was punctuated just as it now is, a comma being between stone and spar and that the order was for stone, the rest of it being only explanatory, "spar such as potters use."

The evidence then shews that spar or feld-spar is a substance used in the United States for the like purpose in potteries that stone or Cornwall stone is used for in England.

The defendants enter on their order book, on receipt of the writing, that they were to forward *stone*, thus rightly interpreting the order, and they send the receipt of the 11th of January before mentioned to Mr. Bell, in which they credit him with the money sent "for stone, to be sent to Baker & Davey."

Then Mr. Massey, the manager of defendants' business, after consulting the warehouseman, struck out *stone* from the order book and inserted *ground flint*, because he "thought stone must require and mean flint," and, as he said, he "might just as well have sent Cornish stone," and on the 12th of January the invoice was sent for *ground flint*, and the ground flint followed in a barrel.

Upon these facts the learned Judge directed the jury, as before stated, that "the defendants are liable if the order sent by them should by them as men of business have been understood as an order for Cornwall stone, and that plaintiffs were justified in considering, when they received the barrel, that it was Cornwall stone, or unless they knew or had reason to believe that it was not Cornwall stone. If the defendants were justified in sending a barrel of ground flint on the order received, then they cannot be liable to the plaintiffs for any damages." That direction was quite correct, and turned the attention of the jury to a just consideration of the case.

There was evidence from which the jury could well infer the defendants did rightly understand the plaintiffs' order, and that they wrongly sent flint, which is never known by any other name than flint. It may be a species of spar, but it is never called spar.

And, in this view of the case, the verdict was rightly given for the plaintiffs.

The case, however, was argued as if it could not be disposed of on the ground on which we have just considered it, and that the only way of treating it was to hold that in fact the plaintiffs had sent for one article and the defendants understood a different article was required, and so understanding the order, they sent what they believed the plaintiffs had asked for; and as they had done so, that there never was a contract between the parties, and the defendants are not liable for the consequence which followed.

The principle is not disputed, that to constitute a contract the parties must agree about the same thing, as in *Raffles* v. *Wichelhaus*, 2 H. & C. 906.

It is also true that in all contracts he that speaketh obscurely or ambiguously speaks at his own peril, and such speeches are to be taken strongly against himself: *Noy's* Maxims, 91.

And if it is clear there is no consensus, it is no matter what has been written or said, it becomes immaterial: *Re Marchioness of Ely*, 4 De G. J. & S. 638.

These questions ordinarily arise when one party does not do the act which the other claims he should have done, or where goods have been delivered as and for those which were agreed to be delivered, and which are rejected as not being conformable to those which were ordered.

Here the defendants accept the plaintiffs' order, and profess to fulfil it—that is, to fulfil it as they say they understood it, which was different from the plaintiffs' requirement and understanding; and without communicating with the plaintiffs for further information as to what it was they really desired, they send an article as if in compliance with

and as a performance of the order as they understood it, without saying to the plaintiffs they had entertained some doubts as to what it was they wanted; and the plaintiffs, knowing nothing of the defendants' doubts, nor of what they had done different from what the plaintiffs had required them to do, (and here I say nothing of what the invoice told, for I am considering the case at present only as to being or not being a *consensus ad idem*,) use the article sent to them, which does them serious injury in their trade.

This, to be sure, is an action on the warranty, and not an action on the case, but if the plaintiffs, by framing their cause of action, would have any remedy for the damages they have sustained, there would be no object in interfering for the defendants.

"If, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise to disclose the truth, may often have the same effect": Per Parke, B., in *Freeman* v. *Cooke*, 2 Ex. 654, at p. 663.

Here the defendants say they did not know what the plaintiffs wanted, and they "thought *stone* must require and mean *flint*."

Suppose the order had been fulfilled by defendants sending some article like in appearance to what had been ordered, and in its use it had poisoned or killed some of the workmen by explosion, the defendants could not have sheltered themselves from the consequences by the plea that they had sent that article because they did not know what they were asked for, and they thought the article sent would do for the one they could not make out.

If such a defence could be allowed a druggist might give a deadly poison to a customer simply because he did not know what it was his customer asked for.

The defendants either did know or did not know what was to be delivered. If they did know—and in the view of the case before presented, there was evidence they did know—they are liable in this form of action. If they did not know, and they delivered an article carelessly and negligently, and without any enquiry whether it would do or not, and without saying what it was, they would be answerable in an action framed to meet such a case.

If the plaintiffs' order were one for stone, and the defendants purporting to fulfil it sent flint in its stead, I think they would be liable for non-performance of the contract contained in the order given to them, and binding upon them by reason of their acceptance of the payment made to them upon it, and also for a breach of warranty to furnish the article required: *Chanter* v. *Hopkins*, 4 M. & W. 399; *Allan* v. *Lake*, 18 Q. B. 560; *Nichol* v. *Godts*, 10 Ex. 191; and, as before said, I think there was evidence of such a state of facts. I am not satisfied they would be liable on the contract if they clearly misunderstood the order and did not contract for any other article than the delivery of flint which they did send. I think they would not be liable in such a case. They would be obliged, however, to refund the money which had been paid to them, and they might be entitled to set-off the flint which they had sent to the extent it had been serviceable to the plaintiffs, or if the plaintiffs had used it carelessly, knowing or having the means of knowing what it was. And, as before stated, I think they would be liable, on a count adapted to the case if carelessly they sent an article not comprehending the terms of the order, and taking no means to inform themselves what it meant, for the mishief the article they did send had caused.

For the reasons given I am of opinion the rule absolute in the Court below ordering a nonsuit to be entered must be ordered to be discharged with costs, and that the *postea* be delivered to the plaintiffs, and that this appeal be allowed with costs to the plaintiffs.

HARRISON, C. J., and MORRISON, J., concurred.

Appeal allowed with costs.

DOWNEY ET AL. V. PATTERSON.

Vessels—Collision—Accident—New trial—Direction to the jury.

In an action for collision between two sailing vessels owned by the plaintiffs and defendant respectively, it appeared that both vessels were running to windward close-hauled, the plaintiffs' vessel on the starboard, and the defendant's vessel on the port tack. Defendant's vessel, it was admitted, did what was best as soon as the plaintiffs' lights were seen, but the complaint was, that he should have seen them sooner. This he explained by alleging that there was a haze on the water, which the plaintiffs' witnesses denied. The jury were directed that if defendant used every means in his power to avoid a collision after he saw the plaintiffs' lights he would not be liable, nor if they believed it was simply an accident without negligence on the defendant's part.

Held, under the circumstances, not a misdirection; but the jury having found for defendant a new trial was granted, on affidavits shewing the discovery of new evidence to prove that there was no haze at the time.

DECLARATION: that the defendant so negligently navigated his schooner that it ran foul of and injured a schooner of the plaintiffs, &c.

Pleas: not guilty. 2. Not the plaintiffs' schooner. 3. That the injury was caused by the negligence of the plaintiffs

The cause was tried at the Napanee Fall Assizes, 1875, before Galt, J., and a jury.

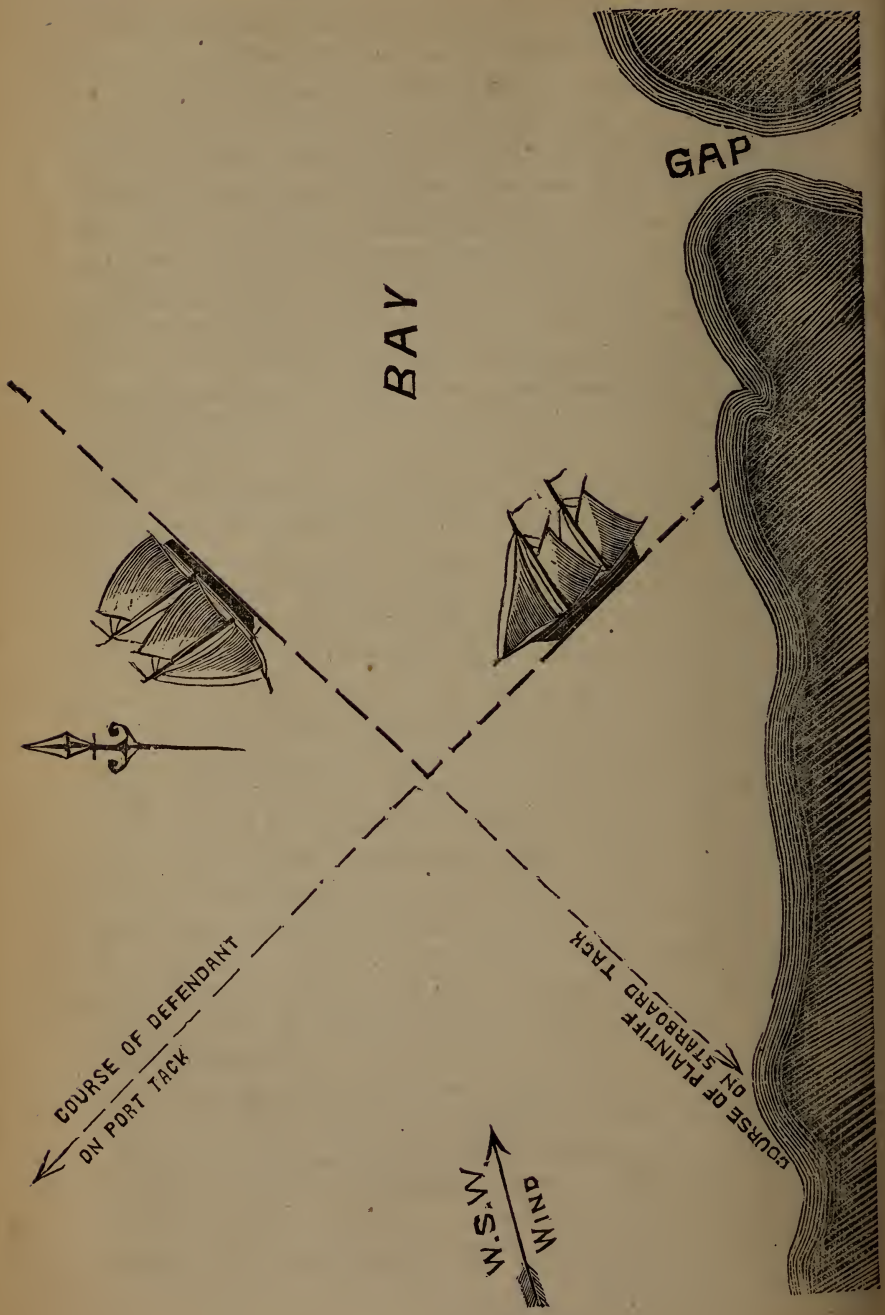
A number of witnesses were examined on both sides.

The evidence is sufficiently stated in the judgment.

The learned Judge in his charge to the jury told them that if the evidence satisfied them that the collision was simply an accident without negligence on the part of the defendant, their verdict should be for the defendant: that the defendant had as good a right to navigate his vessel as the plaintiffs had, but that it was his duty to get out of the way of the plaintiffs' vessel in case they met: that it was no more incumbent on the defendant to remain on the south shore of the Bay of Quinte than it was for the plaintiffs' vessel to remain on the north side: that what the law required was, that the plaintiffs' vessel should hold her course, and that the defendant should give away in case they met.

The jury found for the defendant, saying that they believed it was an accident.

The following sketch shews the position of the vessels before the accident.


GAP
BAY
COURSE OF PLAINTIFF ON STARBOARD TACK
COURSE OF DEFENDANT ON PORT TACK
W.S.W.
WIND

In Michaelmas term last, November 16, 1875, *W. A. Reeve* obtained a rule to set aside the verdict, the same being contrary to law and evidence, and against the weight of evidence, and for misdirection of the learned Judge in charging the jury that if the defendant used every means in his power to avoid the collision after he saw the lights of the plaintiffs' vessel, the defendant was not liable: that the jury should have been charged that if the defendant knew the position of the plaintiffs' vessel, and that there was risk of collision, even if he did not see the plaintiffs' vessel or her lights, he should have kept out of her way, and also upon the ground of the discovery of new evidence.

During this term, February 19, 1876, *Britton* shewed cause. This case is governed by 31 Vic. ch. 58, sec. 2, article 12, D. The vessels were crossing. They had the wind on different sides and defendant should have kept out of the way of plaintiffs' vessel. The only question was, whether he could do so, and that was for the jury, who found for defendant. The plaintiffs' vessel was right in keeping its course, and the defendant ported his helm. Articles 19 and 20 shewed that the rules in sec. 2 apply only when no immediate danger is to be apprehended; when necessary, there may be a departure from them. He referred to *Abbott* on Shipping, 11th ed., 614, 616.

Reeve, contra. The question was, whether the collision was an accident or not. The jury found that it was. It was not alleged that plaintiffs were in fault. Defendant admitted that he was aware pretty nearly where plaintiffs' vessel was, and he knew there was danger of a collision, and that is enough to shew he was guilty of negligence. The defendant should have called the man he had on the look-out, at the trial. Article 18 requires the plaintiffs to keep on their true course. *Tuff* v. *Warman*, 5 C. B. N. S. 572, shews that each party is justified in acting as if the other would obey the statute. If there was a haze, as defendant says, he should have acted with more caution. The case has not been fully tried, and the affidavits now put in shew

that the haze did not exist. He cited *The John Frazer*, 21 How. 184; *The Uhla*, 19 L. T. N. S. 89; *The Pepperell*, Swabey 12; 1 *Parsons* on Shipping, 580; *Nellie D.*, 5 Blatch. 245.

March 17, 1876. MORRISON, J.—It appeared from the evidence at the trial, that the plaintiffs' schooner called the "Downey," commanded by one of the plaintiffs, and the defendant's schooner, commanded by himself, in the latter part of October, 1874, were both bound up the Bay of Quinte. The wind at the time was about W.S.W., a little north of the course, up the bay, both vessels were therefore plying to windward, close-hauled; the wind fresh, and the vessels making about seven knots.

The "Downey" at the time of the collision, which was about 8 p.m., was close hauled on the starboard tack; the defendant's vessel close hauled on the port tack; the vessels being about eight miles up the bay from the gap their respective lights burning. About fifteen minutes before the collision, the defendant's vessel had wore, and was standing towards the north shore of the bay, which was there about 1½ miles wide, her course being about N.W.; that of the "Downey" about S.W. The plaintiffs' evidence went to shew that the lights of the defendant's schooner were seen from the "Downey," and according to his testimony, those on board of the defendant's vessel could have seen the plaintiffs' lights if they were keeping a look-out for ten minutes before the collision.

It appeared that at the time the "Downey" was run into, she was hauled as close to the wind as she could lie, and was keeping on her course: that just before she was struck, the helm of the defendant's vessel was put up, and her main sheet let go to keep away; and the captain of the "Downey," seeing what the defendant was doing, stated, in his opinion, he could have done nothing to avoid the collision; and that the defendant in putting up his helm and casting off the main sheet did what was right, but that it was done too

late to enable the plaintiffs' vessel to pass clear. The latter was struck about midships, her main rigging, bulwarks, &c., being carried away. On the previous tack, when the vessels crossed each others' course, the "Downey" passed around the stern of the defendant's vessel. After the collision, and while the vessels were together, the defendant got on board the "Downey," and he then stated that he and all his hands were on deck, and that he put his helm up as soon as he saw the "Downey's" light. Several witnesses testified that the night was not dark, and that in their opinion there was nothing to prevent the vessels seeing each other's lights. All were of opinion that what the defendant did was right, if done in time, and that on the other hand the plaintiffs were right in keeping their course. According to the defendant's testimony, he having crossed the "Downey" several times while beating up, he knew she was in the vicinity, and so he directed his men to keep a look-out for her, and to let him know the instant he saw her lights, as he said. These words hardly left his mouth when one of his hands said "there are her lights," when he ordered the helm up and the main-sheet to be let go: that his vessel payed off as rapidly as she could, but not in time to prevent the collision.

According to the evidence on the part of the defendant, the night was dark and hazy at the time, which prevented the "Downey" being seen, and he also said he supposed the "Downey" would pass under his stern as she had done so on the previous tack: that at the time he was looking out for her lights, as he knew there was danger of a collision, and that about three minutes after he saw the "Downey's" light the vessels struck; and he attributed his not seeing her sooner to the haze on the water, which extended at the time, as he said, all over the bay.

Upon the argument it was contended by Mr. Reeve, that the jury were not warranted in arriving at the conclusion they did, viz., that the collision was an accident, and not the result of negligence on the part of the defen-

dant. I cannot say that there was not evidence to justify the jury finding for the defendant, if they were satisfied from the evidence that the night was dark and hazy. The most vigilant look-out might not have enabled the defendant or his men to see the "Downey" or her lights until so close that the collision was inevitable.

Evidence of the true cause of collisions happening at night or in hazy weather, is frequently contradictory, arising, no doubt, from the difficulty in judging of distances and the true position and courses of the vessels, and that on such occasions there is excitement and confusion.

The defendant's vessel, although it was hazy, had the same right to proceed in her way up the bay as the plaintiffs had, observing the rules of navigation, and with such caution and care as prudent seamen would usually employ when beating up a narrow bay under similar circumstances. Whether the defendant observed such rules, is a question of fact for the jury.

It seems to me in this case the question was, assuming there was a good and effective look-out on board the defendant's vessel, could they have seen the "Downey" in time to have ported the helm and gone to leeward and so have avoided the collision, for if they could have done so, the defendant would have been liable on account of culpable delay in not taking measures to keep out of the "Downey's" way.

The defendant, according to his own testimony, knew the "Downey" was in the vicinity and beating to windward, and he being on the port tack, the law imposed upon him the obligation of taking the proper measures to get out of the way of the other vessel, (which in this case was entitled to keep her course,) as soon as he saw her, and it was his duty to keep a good and vigilant look-out for that purpose. The jury, I assume, by their verdict found that there was such a look-out, and that the collision was an accident owing to the hazy state of the atmosphere which prevented the "Downey" being seen until so close that it was inevitable.

I do not think there was any misdirection in the learned Judge telling the jury that if the defendant used every means in his power to avoid the collision after he saw the lights of the plaintiffs' vessel, the defendant was not liable. That part of the charge was predicated upon the evidence given and contention of the defendant that he was keeping a vigilant look-out, and that the "Downey" was not seen until it was not possible to avoid a collision. All the witnesses said the defendant did what was right. The only other course he had was to throw his vessel in stays which would not have prevented a collision.

Nor was there misdirection in the learned Judge telling the jury that if they believed it was simply an accident, without negligence on the part of the defendant, the latter was not liable.

Dr. Lushington, in the case of *The Virgil*, 7 Jur. 1174, said: "In law, inevitable accident is this—that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill * * : It is not enough to say 'I could not prevent the accident at the very moment, it occurred'; could you have previously adopted measures to render the occurrence of it less probable."

The same learned Judge in the case of the *Uhla*, 19 L. T. N. S. 89, cited by Mr. Reeve, said, at p. 90: "Inevitable accident is where one vessel doing a lawful act without any intention of harm, and using proper precautions to prevent danger, unfortunately happens to run into another vessel * * The caution which the law requires, is not the utmost that can be used, it is sufficient that it be reasonable, such as is usual in ordinary and similar cases."

As the learned Judge reports, such was the import of his charge, applying these definitions to the evidence in this case.

I think there was evidence upon which the jury might find that the collision was one of inevitable accident. It is true the evidence on the part of the plaintiffs would lead one to infer that there was negligence and culpable delay

on the part of the defendant's vessel in not porting her helm according to Article 12 of Steering and Sailing Rules of 31 Vic. ch. 58, D.

On the other hand, the evidence on the part of the defendant went to shew that on his vessel a proper look-out was kept, and that owing to the night and the haze on the water, he was prevented from seeing the "Downey" or her light at any distance, and the moment her light was visible he instantly took the proper course to get out of her way, but without effect, and that the collision was inevitable; and the jury took that view of the case.

Mr. Reeve contended further that the learned Judge should have told the jury that if the defendant knew the position of the "Downey," and that there was risk of collision even if he did not see her or her lights, he should have kept out of her way. I could not during the argument see what is here meant. Both vessels were sailing crafts and beating to windward, going about the same rate on opposite tacks. If the defendant could not see the "Downey" or her lights, I cannot understand what the defendant was to do to keep out of her way. Without seeing her he could not well know her actual position, whether she was to leeward or windward, or whether she had passed to the southward of his course.

On the whole I am of opinion there was no mis-direction, and I cannot say that the finding was against evidence. The plaintiffs ask for a new trial on the ground of discovery of new evidence, or rather upon the ground that it was not true that there was any haze on the water at the time of the collision, and that since the trial they have become aware of two witnesses who can testify to that effect, viz., the captain and the mate of another vessel who were sailing at the same time a short distance behind the defendant's schooner, and that they would procure their attendance on another trial. The affidavits of these persons have not been filed.

In ordinary cases we would not necessarily grant a new trial upon affidavits such as are now filed; but as the

defendant excused himself from seeing the "Downey" on account of haze on the water, and as the evidence in that respect was contradictory, and as the plaintiffs may not have anticipated the defence set up, and as there may be some misapprehension as to the effect of the learned Judge's charge, we think it would be more satisfactory that there should be a new trial, costs to abide the event.

HARRISON, C. J., and WILSON, J., concurred.

Rule absolute.

MEMORANDA.

During this term the following gentlemen were called to the Bar:—

JOHN WILLIAM FROST, HERBERT CHARLES GWYN, JOSIAS RICHEY METCALF, ARTHUR GODFREY MOLSON SPRAGGE, ROBERT GREGORY COX, EDWARD DOUGLAS ARMOUR, ALBERT ROMAINE LEWIS.

MEMORANDA.

In the vacation after Hilary term the following gentlemen were appointed Her Majesty's Counsel for Ontario, by His Excellency the Lieutenant Governor :—

On March 11th, 1876.

Robert S. Woods, James A. Henderson, Alexander Leith, Thomas Robertson, John O'Connor, Hector Cameron, James Beaty, Jr., George A. Drew, James Maclennan, David Tisdale, Dalton McCarthy, Hewitt Bernard, Angus Morrison, George R. VanNorman, George E. Henderson, Edward Fitzgerald, Thomas Hodgins, John Hoskin.

On March 13th, 1876.

Richard Martin, Thomas Scatcherd, Robert Lees, Francis R. Ball, The Honorable Alexander Morris, Frederick Davis, Edward Martin, Henry B. Beard, Thomas Wardlaw Taylor, Francis MacKelcan, William Kerr, Byron Moffatt Britton, Edmund J. Senkler, Malcolm Colin Cameron, Timothy Blair Pardee, William Hepburn Scott, William Ralph Meredith, Warren Rock, William Lount, John Galloway Scott, James Bethune, James Kirkpatrick Kerr, Britton B. Osler, Thomas Deacon, James S. Sinclair, Thomas Ferguson, John Alexander Boyd, James F. Dennistoun, Hugh Macmahon, David Glass, John Idington, Arthur Sturgis Hardy, Hon. Christopher Findlay Fraser, Donald Ban Maclennan, Donald Guthrie.

During Hilary Term, the following rules were read in Court:—

IN THE

COURT OF QUEEN'S BENCH,

AND THE

COURT OF COMMON PLEAS.

Regulae Generales.

Hilary Term, 39th Victoriæ.

Whereas it was enacted by sec. 154 of the C. L. P. A., 1856, That the Record of Nisi Prius should not be sealed or passed;

And whereas, in consequence, the practice in England as to making up and delivering Paper Books and Issue Books was introduced by Rule No. 33, of the General Rules as to Practice of Trinity Term, 1856;

And whereas, afterwards, by sec. 203, of chapter 22 of the Consolidated Statutes of Upper Canada, it was provided that the Record of Nisi Prius need not be sealed, but shall be passed and signed as therein declared;

And whereas, in consequence of the last mentioned enactment, it has become expedient to rescind the Rule No. 33, of the General Rules of Trinity Term, 1856, and to make provision as hereinafter mentioned;

It is therefore Ordered:

1. That Rule No. 33, as to Practice, of Trinity Term, 1856, shall be, and the same is, hereby rescinded.

2. That the practice in England, as to making up and delivering Paper Books and Issue Books for the purpose of settling the same, is not to be allowed in future.

3. That all Rules or Orders, inconsistent with this Rule, shall be, and the same are, hereby rescinded.

4. That this Rule shall take effect on and after the second Monday of the present Term of Hilary.

Toronto, Monday, 7th February, 1876.

Hilary Term, 39th Victoriæ.

It is Ordered as follows:

1. That when any Case shall be transmitted by a Court of Oyer and Terminer, or Gaol Delivery, or General Sessions, for the consideration of the Justices of either of the Courts of Queen's Bench or Common Pleas for Ontario, the original Case, signed by the Judge or Chairman of Sessions reserving the question or questions of law, and three copies of such Case, one for each Judge, shall be delivered to the Clerk of the Court at least four days before the day appointed for the argument, unless otherwise ordered by the Court.

2. That every Case transmitted for the consideration of the Court, shall briefly state the question or questions of law reserved, and such facts only as raise the question or questions of law submitted. If the question or questions turn upon the Indictment, or any count thereof, then the Case must set forth the Indictment or the particular count.

3. That every Case must state, whether judgment on the conviction was passed or postponed, or the execution of the Judgment respited, and whether the person convicted be in prison, or has been discharged on recognizance of bail to appear and receive Judgment, or to render himself in execution.

4. That whenever a Case is sent back for amendment, the same shall be re-argued, as regards the matter amended, unless the Court otherwise order.

5. That the original Case as amended, and three copies thereof, or only of the amended portion or portions thereof, if the Court so order, shall be delivered to the Clerk of the Court at least four days before the day appointed for the re-argument, unless otherwise ordered by the Court.

6. That on every such argument or re-argument, as aforesaid, the Counsel for the prisoner or defendant shall have the right to begin and reply, unless the Court otherwise order.

7. That these Rules shall take effect forthwith.

Osgoode Hall.

Toronto, 7th February, 1876.

(Signed) JOHN H. HAGARTY,
" ROBT. A. HARRISON,
" J. C. MORRISON,
" ADAM WILSON,
" JOHN W. GWYNNE,
" THOMAS GALT.

Hilary Term, 39th Victoriæ.

It is Ordered as follows:

1. That on every application for a Rule for a New Trial, or to enter a verdict or nonsuit, where the evidence was at the trial taken down by a short-hand writer, there shall, unless the Court otherwise order, be filed with the Motion Paper three copies of the evidence in words at length, each copy to be certified as correct by the short-hand writer.

2. That the short-hand writer shall receive three cents per folio for every folio of one hundred words in each of the said copies (whether the copies be made by means of the type-writer or otherwise), the same to be paid by the person ordering the copies for the purposes of these Rules.

3. That the disbursements incurred in any cause, matter, or proceeding in obtaining copies of the evidence for the purposes of the foregoing Rules, shall, unless the Court otherwise order, be costs in the Cause to the party obtaining and paying for the same.

4. That where a copy of the evidence is required from the short-hand writer by the parties or their Solicitors, the short-hand writer shall receive ten cents per folio of one hundred words on every such copy.

5. That all moneys received by the short-hand writer under the operation of the foregoing Rules shall, when the short-hand writer is paid by salary, be accounted for by him to the Clerk of the proper Court, and shall be by the Clerk of such Court deposited in the Bank for the time being, where the moneys of the Province are deposited, to the credit of an account to be called "The Short-Hand Writers' Fund."

6. That when the short-hand writer is not paid by salary, the said moneys shall belong to and be the property of the said short-hand writer.

7. That in cases other than hereinbefore provided for, the Master may in any cause, matter or other proceeding, allow a reasonable sum for the expense of a short-hand writer, on the Certificate of the Judge before whom the examination of any witness or witnesses in any such Cause, matter or other proceeding takes place.

Osgoode Hall, 10th March, 1876.

(Signed) JOHN H. HAGARTY,
" ROBT. A. HARRISON,
" J. C. MORRISON,
" ADAM WILSON.
" JOHN W. GWYNNE.
" THOMAS GALT.

SITTINGS IN VACATION,

AFTER HILARY TERM.

In Re Day and the Corporation of the Township of Storrington.

Temperance Act of 1864—*Omission to publish the requisition.*

Where a by-law under the Temperance Act of 1864 had been adopted by the electors under a requisition, but the by-law only had been published and not the requisition for adoption of it, as the statute requires, and it was sworn and not denied that this omission prevented many from voting, the by-law was quashed.

March 14, 1876. *Osler* obtained a rule *nisi* calling upon the corporation of the township of Storrington to shew cause why the by-law of the said corporation passed or adopted by the ratepayers of the township, on the 5th day of May, A.D. 1875, for prohibiting the sale of intoxicating liquors in the said township should not be quashed, with costs, on the ground that the requisition for the by-law was not published before the said by-law was voted upon as required by the statute in that behalf, and was not published according to law, and on grounds disclosed in affidavits and papers filed.

April 11, 1876. *S. Richards*, Q. C., shewed cause.

F. Osler supported the rule.

The facts sufficiently appear in the judgment.

April 18, 1876, Harrison, C. J.—The 27–28 Vic. ch. 18, commonly called the Dunkin Act, is intituled "An Act to amend the laws in force respecting the sale of intoxicating liquors and the issue of licenses therefor, and otherwise for repression of abuses arising from such sale."

Power is given either for the passage of a prohibitory by-law by the council or for the adoption of such a by-law by the people, subject to certain proceedings in the Act specified.

"From the day when such by-law takes effect, for other purposes as aforesaid, and for so long thereafter as the same continues in force, no person, unless it be for exclusively medicinal or sacramental purposes, or for *bonâ fide* use in some art, trade or manufacture, or as hereinafter authorized * * shall within such county, city, town, township, parish, or incorporated village, by himself, his clerk, servant, or agent, expose, or keep for sale or, directly, or indirectly, on any pretence or by any device, sell or barter, or in consideration of the purchase of any other property give to any other person any spirituous, or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating:" sec. 12.

It is in the power of the municipal council, if it see fit, at any time, on its own motion to pass a prohibitory by-law: sec. 1. But the by-law so passed, or intended to be passed, is made subject to the vote of the municipal electors, in case the municipal council, when passing the by-law, order the same to be submitted for approval to the municipal electors: sec. 3. Or in case any thirty or more duly qualified municipal electors by a requisition in the form A. require that the by-law at any time within one year from the date of the requisition be submitted for the like approval: sub-sec. 2 of sec. 3.

Besides, it is in the power of any thirty or more duly qualified municipal electors by a requisition in the form A. 2, to propose a by-law for adoption by the electors, and require that a poll be taken whether or not they will adopt the same: sec. 4.

The form of the first-mentioned requisition is as follows:—

"The undersigned qualified municipal electors of (designate the municipality), hereby require that any by-law which the municipal council thereof may pass under authority or for enforcement of the Temperance Act of 1864, at any time within one year from the date hereof be submitted for approval to the municipal electors of the said municipality." 27–28 Vic. ch. 18, sched. A 1.

The form of the second mentioned requisition is as follows:

"The undersigned qualified municipal electors of (designate the municipality), hereby require that a poll be taken in terms of the Temperance Act of 1864, to determine whether or not the qualified municipal electors of the said municipality will adopt, under authority and for enforcement of the said Act, the by-law following, which we hereby propose for their adoption." *Ib.* Sched. A 2.

"The sale of intoxicating liquors and the issuing of licenses therefor, is by the present by-law prohibited within the (designate the municipality), under authority and for enforcement of the Temperance Act of 1864." *Ib.*

This also is the form of by-law when passed by the council of its own motion: sec. 2.

It is the duty of the clerk of the municipality, on the passing of any order for the submission of a by-law; on the passing of any by-law whereof the submission has been required; or on the receipt of any requisition for the adoption of a by-law, to cause such by-law or such requisition for adoption of a by-law (as the case may be) to be published in the manner directed by sec. 5 of the Act.

The by-law moved against was one adopted by the electors under requisition, and not a by-law passed by the council of its own motion.

The only publication made in reference thereto was the following by-law:

"'The sale of intoxicating liquors and the issuing of licenses therefor, is by the present by-law prohibited within the municipality of the Township of Storrington, under authority and for the enforcement of the Temperance Act of 1864.'

"The above is a true copy of a by-law, duly signed requiring me to hold a poll in the Township of Storrington for confirming or rejecting the same.

"Take notice, that in compliance with the above a poll will be held in the Court House, in the village of Sunbury, in the Township of Storrington, on Wednesday the 5th day of May next, according to law.

"(Signed.) DAVID JAMES WALKER,
"Township Clerk's office, *Township Clerk.*
Invermay, March 29, 1875."

The requisition for the adoption of the by-law was never published.

It was sworn, and not denied, that by reason of the requisition for the adoption of the by-law not being published many of the electors were prejudiced and did not get due notice of the taking of the poll for the adoption of the by-law, and by reason thereof many electors did not vote on said by-law, who would otherwise have voted against, and used their influence against the adoption of the by-law.

There were at the time of the voting more than 500 duly qualified electors in the township; of these only 174 voted in favour of the by-law, and 60 against it. The majority for the by-law was 114.

The relator, when the by-law was being passed and adopted, objected to the proceedings on the ground of want of due publication. He also voted against the by-law.

A by-law whether in the first instance passed by the council or adopted by the electors after proper requisition for the purpose is equally a by-law of the corporation, and being so may be moved against as a by-law of the corporation, and the corporation called upon to shew cause why it should not be quashed. *Re Coe and the Corporation of the Township of Pickering*, 24 U. C. R. 439.

In the event of the adoption of a by-law or requisition the publication of the requisition appears to be essential to its validity.

In *Coe and Pickering* a publication of the requisition for too short a time by a few days was held to be a sufficient ground for the quashing of the by-law.

On the same principle an entire omission to publish the requisition must be held a good ground for the quashing of the by-law.

It was argued that sub-sec. 2 of sec. 37 prevents the by-law being quashed.

The latter enactment provides that no by-law adopted by the electors shall be set aside for any defect whatever, whether of form or substance:

1. Affecting the requisition therefor.
2. The authenticity or number of signatures thereto.
3. The qualification of the signers thereof.
4. Or any matter, thing or procedure *antecedent* to the first publication of the notice given for the poll taken thereon unless the same be unauthorized by this Act.

The objection here is not as to any defect of form or substance affecting the requisition, the authenticity or number of signatures thereto, the qualification of the signers, or any matter thing or procedure antecedent to the first publication of the notice.

The objection is, that the requisition for the adoption of the by-law, which the statute requires to be published for four consecutive weeks, was never published at all.

Sitting where I do, I am bound by the authority of *Re Coe and the Corporation of the Township of Pickering*, 24 U. C. R. 439. And I cannot give effect to the argument in favour of the by-law without overruling that case, which appears to me to be an authority directly in point against the validity of the by-law.

It is to be observed that while the first part of sec. 37 declares that no by-law passed under authority and for enforcement of the Act shall be set aside by any Court for any defect of procedure whatever, the second part declares that no such by-law adopted by the electors of a municipality under the fourth and fifth sections of the Act shall be set aside by any Court for any defect whatever, whether, &c., specifying and limiting the defects intended.

It may be that the first part of the section relates to by-laws passed by the council and submitted to the people under secs. 1, 2 and 3 of the Act, and the second part to by-laws adopted by the people under sec. 5 of the Act, and if so there would appear to be nothing to make valid the by-law now attacked as against the objection raised.

Or it may be that the first part of sec. 37 relates to all by-laws, whether passed by the council or adopted by the people on motion of requisitionists, in which event no such by-law is to be set aside by any Court for any defect of procedure or form whatever.

I cannot adopt the latter construction without directly overruling not only *Re Coe and the Corporation of the Township of Pickering*, 24 U. C. R., but *Re Hartley and the Corporation of the Township of Emily*, 25 U. C. R. 12, and *Re Miles and the Corporation of the Township of Richmond*, 28 U. C. R. 333; and sitting where I do, I am not at liberty to do anything of the kind.

It is not necessary for me, with these authorities before me, to decide what my own opinion would be of the proper construction of sec. 37 if the matter were *res integra*.

I must follow the decisions mentioned, at all events till reversed by the Court of Appeal or other competent authority, and following them, must make absolute this rule, with costs.

Rule absolute with costs.

In Re Wycott and the Corporation of the Township of Ernestown.

Temperance Act of 1864—*Publication of requisition.*

The requisition for adoption of a by-law under the Temperance Act of 1864, was first published on the 21st January, 1876, the next publication was on the 3rd February, and the last on the 10th February—so that there was no publication for the week beginning 28th January, though the statute requires it to be published "for four consecutive weeks."

The Court refused to quash the by law on this objection, it having been carried by a majority of 240, and there being no allegation that the irregularity prejudiced the voting.

Bethune, on the 21st April, 1876, obtained a rule calling on the Corporation of the township of Ernestown to shew cause why the by-law restraining the sale of intoxicating liquors within the township of Ernestown, submitted to the electors of the said township, and voted on on the 25th, 26th, and 28th days of February, 1876, should not be quashed, with costs to be paid by the said corporation, on the ground

that the requisition for the by-law and the notice published by the clerk of the corporation signifying the day on which the meeting of the electors should be held for the taking of the poll to decide whether the by-law proposed should be approved or adopted were not published in any newspaper before the day on which the meeting of the electors was held for four consecutive weeks, as required by the statute in that behalf, and on grounds disclosed in affidavits and papers filed.

The requisition for the by-law was in the following form :—

"The undersigned, qualified municipal electors of the municipality of the Township of Ernestown, hereby require that a poll be taken in the terms of the Temperance Act of 1864, to determine whether the qualified municipal electors of the said municipality will adopt under authority and for enforcement of the said Act the following by-law, which we hereby propose for adoption, to wit: 'The sale of intoxicating liquors, and the issuing of licenses therefor, is by the present by-law prohibited within the Municipality of the township of Ernestown, under authority and for enforcement of the Temperance Act of 1864.' Witness our hands this twenty-first day of January, in the year of our Lord one thousand eight hundred and seventy-six."

Then followed the signatures of J. R. Fraser and thirty-four others.

The requisition was published in the Napanee *Express*, a newspaper published weekly in the town of Napanee, in the county of Lennox and Addington.

The names of the municipal electors (with the exception of J. R. Fraser) who signed the requisition were not published.

The first publication was on 21st January, 1876. The next publication was on 3rd February, 1876. The third and last publication 10th February, 1876.

Annexed to the printed requisition so published was a notice subscribed by Robert Aylesworth, clerk of the municipality, to the effect that on Friday, 25th February,

1876, at 10 o'clock in the forenoon, a meeting of the municipal electors of the municipality would be held at the drill shed, in the village of Odessa, in the township of Ernestown, for the taking of a poll to decide whether the by-law referred to in the requisition should be adopted.

Pursuant to the notice, a meeting of the municipal electors did take place on Friday, 25th February, 1876, the reeve of the township presiding, and the clerk of the township attending with the assessment roll.

The poll was, on 25th February, 1876, opened, and continued on 26th and 28th February following, when it was closed.

There were for the adoption of the by-law.....	283
For its rejection.....	43
Majority for the by-law.....	240

The rule *nisi* to quash the by-law was, according to the affidavit of service, personally served on 22nd April 1876, on the reeve of the township.

April 28, 1876. *Osler* moved absolute the rule. No cause was shewn.

May 5, 1876. HARRISON, C. J.—The statute requires the requisition to be published for four consecutive weeks in some newspaper published weekly or oftener within the municipality; or if there is no such newspaper published in the municipality, then in some newspaper published as near hereto as may be: 27-28 Vic. ch. 18 sec. 55.

The first publication of this requisition was on Friday, 21st January, 1876. The second week, therefore, according to *Re Coe and the Corporation of the Township of Pickering*, 24 U. C. R. 439, and *Re Miles and the Corporation of the Township of Richmond*, 28 U. C. R. 333, began on Friday, 28th January, 1876, the third on Friday, 4th February, 1876, and the fourth on Friday, 11th February, 1876; and by this mode of computation the last week would end on Thursday, 17th February, 1876.

The difficulty, if any, in this case, is that there was no publication for the week beginning 28th January, 1876.

This is not the difficulty which presented itself in *Coe* v. *Pickering*. In that case the day fixed for the taking of the poll was *within* the four consecutive weeks, and two days sooner than authorized by the statute. This was also the difficulty in *Re Miles and the Corporation of the Township of Richmond*, 28 U. C. R. 333.

The day for the taking of the poll must, according to the statute, be "some day within the week *next after* such four weeks": Sec. 5.

The day here fixed was 25th February, 1876, which was a day within the week next after the four weeks from the first publication.

So far as the present requisition is concerned, the provisions of the statute have been neglected in this, that there was no publication at all during *one* of "the four consecutive weeks."

While I feel bound by *Coe and Pickering* and *Miles and Richmond*, and will follow them wherever directly applicable, I do not feel bound to extend their operation to cases to which they are really not applicable, especially where it appears that the irregularity, if any, complained of could not in any manner have substantially affected the result of the poll: See *In re Brophy and the Corporation of the Village of Gananoque*, 26 C. P. 290, per Gwynne, J.

This is the well understood rule in the case of municipal elections where the contest is, as to the person or persons elected to an office: See *Regina ex rel. Preston* v. *Touchbane*, recently decided by me in Chambers (*a*).

I do not see why a different rule should be applied where the contest is as to whether a particular by-law has been adopted by the electors.

In *Day* v. *Storrington*, *ante* 528, recently before me, where the application was similar to the present, and it

(*a*) Not reported.

was sworn and not denied that the irregularity complained of prejudiced the voting, I quashed the by-law.

Here there is no such allegation, and in the absence of some such allegation I do not feel called upon to quash a by-law for an irregularity not apparent on its face, and which could not be shewn in any manner to have affected the result of the poll.

I have no doubt as to the power of the Court on such an objection to quash such a by-law: See *Simpson* v. *The Corporation of the County of Lincoln*, 13 C. P. 48; but the exercise of the power must in every case depend on circumstances: See cases cited *In re Richardson and The Board of Commissioners of Police of the City of Toronto*, post 621.

In this case, as in *Boulton and The Council of the Town of Peterborough*, 16 U. C. R. 380, where a somewhat similar objection was made, I think it better not to quash the by-law, but "leave it to the party complaining, if he pleases, to test the validity of the by-law by resisting its operation or by bringing an action for anything done under it as he may be advised."

This course is more in accordance with the provisions contained in sec. 37 of the Act than would be a contrary course.

There is no doubt that the Legislature by the provisions contained in sec. 37 of the Act intended to sustain all such by-laws, "unless there were very clear and substantial objections for setting them aside." Per Draper, C. J., in *Re Hartley and Corporation of Emily*, 25 U. C. R. 12, 14. See also per Draper, C. J., in *Re Boon and The Corporation of the County of Halton*, 24 U. C. R. 361; per Hagarty, C. J., in *Re McLean and Corporation of Bruce*, Ib. 621; per Hagarty, C. J., in *Re Lake and The Corporation of Prince Edward*, 26 C. P. 173.

The objection here taken is not, I think, sufficiently substantial to make it the duty of the Court, in the absence of any allegation that the result would have been different

if the irregularity had not existed, to quash a by-law carried by so large a majority of the ratepayers.

The rule *nisi* must be discharged, but, as the municipal council called upon did not see fit to shew cause, without costs. See *In re Kelly and The Corporation of the City of Toronto*, 23 U. C. R. 425.

Rule discharged.

Redford v. The Mutual Fire Insurance Company of Clinton.

Insurance—Statement as to value—Knowledge of agent.

To an action on a fire policy on a dwelling house and barns, defendants pleaded that by the application, which formed part of the policy, it was declared that any misrepresentation would render the policy void; and that in the application the plaintiff falsely represented that the value of the dwelling house insured was $2,000, whereas it was not of that value, but of a much smaller value. Another plea stated the false representation to be that $1,500 was not more than two-thirds of the value of the buildings, whereas it was far more.

The plaintiff replied to each plea, on equitable grounds, that one H., being defendants' secretary and their duly authorized agent, and having full knowledge of the value of the buildings, prepared the application, and without any enquiry of the plaintiff, but acting on his own knowledge of the buildings and their value, acquired in the proper discharge of his duty as such secretary and agent of defendants, wrote therein the said values; and the plaintiff honestly believing the value to be correct, and without any concealment, falsehood, or fraud, at the request of said H., signed said application.

Held, on demurrer, a good replication, for the representation as to value was not a warranty, but a statement of matter of opinion, a mistake in which, in the absence of fraud, could not avoid the policy.

Held, also, that if no fraud were necessary to support the plea, the replication would be a good answer, for the knowledge of the agent, acquired as alleged, would be the knowledge of defendants.

Declaration on a policy of insurance dated 10th of May, 1872, whereby defendants, for the consideration therein mentioned, insured the plaintiff against loss by fire to the amount of $1,500, as follows :—$1,300 on dwelling-house; $200 on barn and sheds; total $1,500; subject to

the conditions endorsed upon the policy. There were the usual averments of interest and loss by fire to the amounts insured.

The defendants pleaded that in and by the application for the policy, which forms part of the policy, it is declared that any misrepresentations (meaning misrepresentations of the facts therein stated) would render the policy void; and that in and by the application the plaintiff falsely represented that the value of the dwelling-house in the application mentioned was $2,000, whereas the value of the dwelling-house was not at the time of the application of the value therein stated, but of a much smaller value.

Another plea was, that in and by the application for the policy it is declared that any misrepresentations (meaning misrepresentations of facts therein stated) would render the policy void: and that in and by the said application the plaintiff falsely represented that $1,500 was not more than two-thirds of the value of the buildings in the application mentioned, exclusive of the land (meaning the land on which said buildings were erected), whereas $1,500 was a far greater sum than two-thirds of the value of the buildings.

The plaintiff, for a replication to each of the said pleas, on equitable grounds, in effect stated that one Solomon Hill, being the secretary of the defendants and their duly authorized agent, and having full knowledge of the value of the buildings, prepared the application, and without any previous enquiry of the plaintiff in that behalf, but acting on his own knowledge and information of and concerning the buildings and the value thereof, acquired in the proper discharge of his duty as such secretary and agent of the defendants, did write therein the said values, and the plaintiff honestly believing the values to be correct, and without any concealment, falsehood or fraud on his part towards the defendants, and at the request of the said Solomon Hill, as such secretary and agent of the defendants, signed the application so filled up as aforesaid.

To each replication there was a demurrer, on the grounds following: 1. That the replication is no answer to the plea.

2. That it appears by the replication that the plaintiff signed the application containing the conditions, and must have known the contents thereof, and that no excuse is shewn to prevent his being bound by the statements made, or to relieve him from the consequences of his mistake.

March 28, 1876, *McMichael*, Q. C., for the demurrer.
C. Robinson, Q.C., contra.
The arguments and authorities sufficiently appear in the judgment.

April 7, 1876. HARRISON, C. J.—The principles long since enunciated by Lord Mansfield as to insurance, in *Carter* v. *Boehm*, 3 Burr. 1906, 1909, govern insurance disputes to the present time : *Bates* v. *Hewitt*, L. R. 2 Q. B. 595.

He spoke of insurance as a contract upon speculation : that the special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only : that the underwriter trusts to his representations, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. See *Gandy* v. *Adelaide Marine Ins. Co.*, L. R. 6 Q. B. 746. But he also said that there are many matters as to which the insured may be innocently silent,—he need not mention what the underwriter knows,—*scientia utrinque par pares contrahentes facit.* An underwriter, he said, cannot insist that the policy is void because the insured did not tell him what he actually knew—what way soever he came to his knowledge. See *Ionides and The Pacific Fire and Marine Ins. Co.*, L. R. 6 Q. B. 674; S. C., L. R. 7 Q. B. 517.

Hence, on a condition in a policy that it should be void if the assured should "omit to communicate any matter material to be known to the insurer," Martin, B., held that this meant some matter not only material, but also unknown

to the insurers, and that it did not apply to something which might be well presumed to be known to them or their agents: *Pimm* v. *Lewis*, 2 F. & F. 778.

But the defence here rests not so much on omission to communicate as on a false representation.

If there be a misrepresentation of a fact, especially if material to the risk, even though made innocently, through inadvertence, mistake, or negligence, and without any fradulent intention, it will in general vitiate the policy as much as if there had been actual fraud, with this difference, that in all cases where an actual fraud has been committed by the assured or his agent, the underwriter is allowed to retain the premium: *Duckett* v. *Williams*, 2 C. & M. 348; *Geach et al.* v. *Ingall*, 14 M. & W. 95; *Anderson* v. *Fitzgerald*, 4 H. L. 484; *Anderson et al.* v. *Thornton*, 8 Ex. 425; *Cazenove* v. *The British Equitable Ass. Co.*, 6 C. B. N. S. 437.

The statements of facts material to the risk made on applying for a fire policy are more in the nature of warranties than representations, where made by applications wherein the party applying agrees that the application shall be deemed a part of the policy, and covenants that any misrepresentation in the application shall avoid the policy: *Mason* v. *The Agricultural Mutual Association of Canada*, 16 C. P. 493, S. C. 18 C. P. 19.

It is not, however, every answer to every question in an application for insurance which is to be deemed and taken as an assertion or representation of a fact. See *Benham* v. *The United Guarantee and Life Ass. Co.*, 7 Ex. 744; *Anderson et al.* v. *The Pacific Fire and Marine Ins. Co.*, L. R. 7 C. P. 65.

The question may be so put as to ask for a mere statement of opinion, and the question, looking at its subject-matter, may be of that character that an opinion only shall be deemed to be given, and thus not held to be the assertion or representation of a fact, so as in the event of innocent exaggeration to avoid a policy.

No man can generally do more than state his opinion

as to the value of property. There is nothing about which there may be greater difference of opinion among men than the value of real estate. The owner of real estate generally sets a higher value upon it than another, and this simply because it his own, and he flatters himself to be better off in the world than he really is—a mistake very commonly made by men in all conditions of life.

A man may be able to state with something like absolute accuracy the distance of his house from any other building, the material of which his house is built, the number of stoves therein contained, and other matters of description, the accuracy of which before the making of the representation may be absolutely tested.

But when a man is called upon to speak of the value of that which he has no desire to sell—a value which fluctuates from year to year, if not from day to day—he can only speak in language of approximation; he can do no better than state his belief or opinion.

It would be well for insurance companies not to rely too much upon representations as to value, but rather to inspect for themselves before accepting risks. In the case of a vessel which at the time of insurance may be at the antipodes there is seldom an opportunity for an inspection, but in case of property on land having a fixed situs there is no such difficulty.

Where insurers having the opportunity of inspection neglect to inspect the Courts will be slow to relieve them on a question of value, if a jury should find against the view as to value for which they contend; *Dickson* v. *The Equitable Fire Assurance Co.*, 18 U. C. R. 246.

Unless the evidence shew the over valuation to have been intentional and fraudulent the over valuation does not usually affect the policy, and for this reason, that the statement as to value is not so much the assertion of a fact as the expression of an opinion. See *Dickson* v. *The Equitable Fire Assurance Co.*, 18 U. C. R. 246; *Park* v. *The Phœnix Ins. Co.*, 19 U. C. R. 110.

In *Hopkins* v. *The Provincial Ins. Co.*, 18 C. P. 74,

where one of the conditions of the policy was, that the application should form part of the policy, and there was a covenant on the part of the assured that the representation given in the application contained a just, full, and true exposition of all facts, &c., and the interest of the assured therein, so far as the same were known to the assured; and that if any material fact were not be fairly represented, the policy should be void, and the objection was as to the representation of title contained in the application, it was held that in order to establish the *bona fides* of the plaintiff's answers, he might shew that the defendants' agent who drew up his statement had been informed by the plaintiff, or some one else to plaintiff's knowledge, of the state of the title to the premises.

In *Riach* v. *Niagara District Mutual Ins. Co.*, 21 C. P. 464, which was an action on a policy of insurance, where the contest was as to value, an objection which was made on the part of the defence under circumstances somewhat like the present, was not permitted to succeed. The plea was to the effect that by one of the by-laws of the defendants endorsed on the policy, and forming part thereof, it was declared that any misrepresentation in answer to the several queries in the plaintiff's application, should vitiate the policy, &c. Averment: that the plaintiffs, by their application falsely represented the cash value to be $5,000, whereas it was much less, &c. The application was headed "Application for Renewal Policy. * * * * Note, in no case will more than two-thirds of the actual cash value of the property, exclusive of land, be insured." At the foot of the application it was stated, "this application to be and form part and parcel of the policy to be issued hereon." In the body of the application there were two columns, one headed "Amount to be insured," and the other "Present estimated value" in cash. The jury found that the value of the goods at the time of the insurance, though estimated at $8,000, did not exceed $3,500. On this finding, a motion was made to enter a nonsuit, and after argument the rule was discharged. Each of the Judges delivered a written opinion.

Mr. Justice Galt, in delivering his judgment, said p. 468: "It was urged before us by the counsel for the defendants, that as by the policy, the Act of Parliament, the by-law, and the application, the application is to be read as part of the policy, that therefore the statement of the estimated value must be considered as a warranty, and consequently the plaintiffs cannot recover in this case, as it is proved that the value is much less than that estimated. I do not feel that I can accede to this contention, because, if so, the finding of a jury that the true value was less even by a small sum than the amount stated in the application, would be fatal to the plaintiffs. This would be, in my opinion, to convert what is stated to be an estimated value into a warranty of positive value."

Mr. Justice Gwynne said, p. 470: "I cannot think that statements as to price or value are to be regarded in the same way as statements as to title or quality, or as to the existence of a particular fact matter or thing; as for example, that the statement of a person proposing to insure his house as to his idea or estimate of its value, although a jury may not concur in that estimate or idea, is to to be placed in the same category and to be regarded in the same light as a statement that it is roofed with galvanized iron laid over a bed of mortar, when in fact the roof consists of gravel laid in a bed of tar."

Chief Justice Hagarty said, p. 471: "I regard the effect of the plaintiff's contract with defendants to be, that he states the property to be insured is at that time of the estimated cash value of so much; that he warrants (as it were) that, if necessary, he can satisfy a jury that, at least in his honest judgment, they were fairly estimated at that value. I do not use the word warranty in its legal sense, as I do not regard the words here used as implying a warranty so called."

The three Judges agreed that some effect should be given to the allegation, and that it must be held as a representation on the part of the plaintiff that the amount stated is really and truly a fair and reasonable estimate of the value stated, and that if it were shewn by the verdict of a jury

that the estimated value is neither fair nor reasonable as regards the actual value, so much so that it could not have been formed on any estimate honestly made, the plaintiff must fail.

It was argued in the case before me, that as in *Riach* v. *The Niagara District Mutual Ins. Co.*, the words used were "estimated value," the decision is no authority in a case where the word estimate is not used.

I am unable to accede to this argument. Whether the word estimated be used or not, all that is usually given in such cases is an estimate. We must look as well to the substance of the transaction as the mere words used.

In *Chaplin* v. *The Provincial Ins. Co.*, 23 C. P. 278, although the word "estimate" was not used, the same Court followed the principle on which *Riach* v. *The Niagara District Mutual Ins. Co.* was decided, by holding that a representation of present cash value is not a warranty, but is so far material that on the trial the jury should say whether or not there was an over-valuation to the knowledge of the applicant, and if so the policy is void.

I think the result of these decisions to be that a representation as to the value of the property, in an application for insurance, is not to avoid the policy unless the representation be designedly untrue: See *Fowkes et al.* v. *The Manchester & London Life Assurance and Loan Association*, 3 B. & S. 917.

The case of *Riach et al.* v. *The Niagara District Mutual Ins. Co.* has been accepted in the Queen's Bench as an exposition of the law in the latter sense, and was practically applied in *Newton* v. *The Gore District Mutual Fire Ins. Co.*, 33 U. C. R. 92.

But in the decision of this case I am not left to mere inferences from previously decided cases. It appears to me that the case of *Laidlaw* v. *The Liverpool and London Ins. Co.*, 13 Grant 377, cited by Mr. Robinson, is a direct authority against the defendants.

The printed application signed by the plaintiff contained at the end the following memorandum:—"And the said

applicant hereby covenants and agrees to and with the company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk, and agrees and consents that the same be held to form the basis of the liability of the said company, and shall form a part and be a condition of this insurance contract."

The insured, in his written application for insurance on a building, had over-valued the building. He stated its cash value to be $4,000. Its outside value was $3,837 only, and this was including materials not yet in the building. The objection was, that the plaintiff was bound by the so-called warranty, and could not recover. But the Court held that there was only a representation as to value—a statement of a matter of opinion which did not avoid the policy unless fraudulent; and there being no evidence of fraud, the plaintiff recovered.

Although *Laidlaw* v. *The Liverpool and London Ins. Co.* was decided long before *Riach* v. *The Niagara District Mutual Ins. Co.* and *Chaplin* v. *The Provincial Ins. Co.*, and was not cited in either of these cases, it logically expresses the law to be as they decide.

I am not aware that *Laidlaw* v. *The Liverpool and London Ins. Co.*, though decided as long since as 1867, has been in any manner questioned in any subsequent case. The decisions subsequent to it appear to me to be in affirmance of it, although no express reference is made in any of them to it.

It follows from it that a replication, which shews that the secretary of the company, and the duly authorized agent of the company, had at the time of the application full knowledge of the value, and himself prepared the application without any previous enquiry of the plaintiff; that in doing so, he acted solely on his own knowledge acquired in the proper discharge of his duty as such secretary and agent; that he it was who wrote the value; that the plain-

tiff, honestly believing the value, and without any concealment, or falsehood, or fraud on his part towards the defendants, and at the request of their secretary and agent, signed the application, must be a good answer to a plea, which alleges merely a false representation as to value contained in the application.

If the replication be true, and there be no other defence than alleged in the plea, I am at a loss to understand on what ground except with a view to the assessment of damages the suit is defended.

It is necessary that underwriters should be informed of the value of properties on which they propose to accept risks. Knowledge of the value is essential to an intelligent decision on the proposal for the risk. The object of the application, when the question is put as to value in the application, is to convey that knowledge to the underwriters. But when they have knowledge beforehand, the answering of such a question in the application is not necessary for the purpose for which it ought to be designed. If designed for any other purpose, the design is not to be encouraged in a Court of Justice.

What the secretary and duly authorized agent of the company knew before the risk,—where the knowledge is acquired in the course of his employment,—the company, his principals, must be taken to have known. Where that agent himself, of his own knowledge, and without any enquiry of the assured, fills up the application as to value, the company ought to be bound, in the absence of fraud on the part of the assured, or collusion between him and their agent. The secretary and agent in such a case, if the underwriter, would certainly be bound. His principals cannot, in this respect, under an ordinary contract of insurance, be in any better position than the agent.

If it were necessary for the decision of this case to hold that, on the facts appearing in the replication, assuming no fraud necessary for the support of the plea, the replication is a good answer to the plea, I should do so without

any hesitation, and feel that in doing so I was deciding in accordance with the dictates of common law and common sense. See *Wyld* v. *The London and Liverpool and Globe Ins. Co.*, 21 Grant 458, affirmed not only on rehearing, but in Appeal, 23 Grant 442 (*a*). See further *Cumberland Valley Mutual Protection Co.* v. *Schell*, 29 Penn. 31; *Protection Ins. Co.* v. *Hall*, 15 B. Mon. Ky. 411; *Howard Ins. Co.* v. *Bruner*, 23 Penn. 50; *Roth* v. *City Ins. Co.*, 6 McLain C. C. U. S. 324; *Plumb* v. *Cattaraugus County Mutual Ins. Co.*, 18 N. Y. 392; *Caston* v. *Monmouth Mutual Fire Ins. Co.*, 54 Maine 170; *Geib* v. *Enterprize Ins. Co.*, 1 Dillon C. C. 443; *May* v. *Buckeye Mutual Fire Ins. Co.*, 3 Am. 76; *Ætna Live Stock Fire and Tornado Ins. Co.* v. *Olmstead*, 4 Am. 483; *Commercial Ins. Co.* v. *Spankneble*, 4 Am. 582; *Miller* v. *The Mutual Benefit Life Ins. Co.*, 7 Am. 122; *Insurance Co.* v. *Wilkinson*, 13 Wall. 222.

Judgment for plaintiff (b).

(*a*) Since carried to the Supreme Court, where it has been argued and stands for judgment.

(*b*) This case was tried at the Fall Assizes for the County of Welland before HARRISON, C. J., when a verdict was rendered for the plaintiff for $570.33. During Michaelmas term, 1876, this verdict was moved against; but the Court refused a rule *nisi*.

REGINA V. JAMES JOHNSTON.

City Corporation—By-law regarding chimneys—29-30 *Vic. ch.* 51, *sec.* 296, *sub-sec.* 32, *sec.* 223, 224, 372, *sub sec.* 2.—*Costs.*

A city by-law passed on the 26th of October, 1868, providing that no persons other that the chimney inspectors appointed by the Municipal Council (of whom there were to be three), should sweep or cause to be swept, for hire or gain, any chimney or flue in the city, was held to be beyond the power of the Corporation, under the authority given to them to enforce the proper cleaning of chimneys; and a conviction under it was quashed.

It is not the practice to give costs on quashing a conviction.

March 31, 1876. *D. H. Watt*, obtained a rule *nisi*, calling on Alexander McNabb, police magistrate of the city of Toronto, and Emerson Coatsworth, of the same place, inspector for the city, to shew cause why a certain conviction made by the police magistrate, on 23rd February last, on the information of the city inspector, of the defendant, for that defendant did on 23rd February, 1876, sweep a chimney in the city, contrary to the city by-law in that behalf, should not be quashed on the grounds:

1. That the council of the city, in enacting the by-law, exceeded their powers.

2. That so much of section 4 of the by-law as is concerned herein is null and void, as it restrains all persons except the chimney inspector from sweeping chimneys, and does not enforce the proper cleaning of the same.

3. That so much of section 8 as is concerned herein is null and void, as it imposes a fine or punishment on a legal act.

4. That the by-law is a restraint of trade.

5. That the exclusive privilege of sweeping chimneys is given by the said by-law to the chimney inspector, contrary to law.

6. That the charge is no offence, either by statute or common law.

And on grounds disclosed in affidavits and papers filed.

The by-law in question was passed on 26th October, 1868.

It is intituled "A by-law to provide for the appointment of chimney inspectors, and to define their duties."

It divides the city of Toronto, for the purpose of chimney inspection, into three districts, and authorizes the appointment of an inspector for each of the three districts.

The duties of inspectors under the by-law are:—

1. To provide themselves with such brushes and other apparatus for cleaning chimneys, as shall be approved by the standing committee on fire, water, and gas, &c.

2. To cause to be well and effectually swept each and every flue or chimney in use in the city, within their several districts.

3. To accompany in person the chimney sweepers in their rounds through their respective districts, to see that they discharge their duties in a proper and careful manner, &c.

4. To make a report to the clerk of the council, on each and every Monday in the year, by ten o'clock in the forenoon, containing all infractions of the by-law, by whom and where committed, and prosecute to conviction when practicable all offenders.

The fees authorized for services under the by-law are:—

1. For a one-story house, for each flue, ...10 cents.
2. For a two-story house, " .....15 "
3. For a house over two stories, " .....20 "

Shop and parlour chimneys not used except in winter, are required to be swept only once in each year, and kitchen chimneys twice in each year.

Section 4 of the by-law provides, among other things, "That no persons other than the chimney inspectors appointed by the municipal council, shall sweep or cause to be swept, for hire or gain, any chimney or flue in the city."

Section 8 imposes a penalty not exceeding $50, together with costs of prosecution, for every infraction of the by-law.

The conviction was for that he, the said James Johnston, did on 22nd February, 1876, at and in the city of Toronto, sweep a chimney for hire, he, the said James Johnston, not being a chimney inspector appointed by the council of the city, contrary to the by-law of 26th October, 1868, intit-

uled "A by-law for the appointment of chimney inspectors, and to define their duties."

The defendant was in the habit of sweeping chimneys at a less rate than prescribed by the by-law, that is to say—

1. For a one-story house, for each flue, ... 5 cents.
2. For a two-story house, " .....10 "
3. For a house over two stories, " .....15 "

April 11, 1876. *Biggar* shewed cause, contending that the by-law was valid, citing *Harrison's* Mun. Man., 3rd ed., pp. 167, 168.

D. H. Watt contra, relied on *Re Nash and McCracken*, 33 U. C. R. 181; *Regina* v. *Wood*, 5 E. & B. 49; *Everett* v. *Grapes*, 3 L. T. N. S. 669; Municipal Act of 1866, sec 220.

April 18, 1876. HARRISON, C. J.—The by-law in question was passed under sub-sec. 38 of sec. 296 of 29–30 Vic., ch. 51.

That enactment empowered the council of every city, town, and incorporated village to pass by-laws "for regulating the construction of chimneys, as to dimensions and otherwise, and for enforcing the proper cleaning of the same."

It was in effect the same as is sub-sec. 32 of sec. 384 of the present Municipal Act, 36 Vic. ch. 48.

The latter sub-section is one of several sub-sections to the same section (sec. 384). All of the sub-sections provide for the passing of by-laws for various purposes. Some of the by-laws may be to prevent, while the greater part are only to regulate. There is a great difference between prevention and regulation. See note *e* to sec. 346 of *Harrison's* Municipal Manual, 2nd ed. So there is a great difference between restraint and regulation. See note *k* to sec. 224 of Municipal Manual, 2nd ed.

It is lawful for any man honestly to acquire a livelihood in the service of his fellow-men. No man in any municipality should be prevented from the exercise of a lawful calling by mere inference.

There is nothing in the Municipal Act which in direct language enables a municipal council by by-law to prevent any man sweeping the flues of the chimneys in his own house. And that which a man may himself lawfully do, he may in general lawfully employ another to do.

All that the section of the Act declares is, that by-laws may be passed for the regulation of the construction of chimneys, as to dimensions and otherwise, and "for *enforcing* the *proper* cleaning of the same."

It cannot be intended by these latter words that power is to be implied to prevent the proper cleaning of chimneys by others than officers especially appointed for the purpose.

Municipal councils are, by sub-sec. 34 of the same section, enabled to pass by-laws "for regulating and enforcing the erection of party walls."

It might under this sub-section as well be argued that party walls shall only be constructed by officers of the corporation duly appointed for the purpose.

The object to be attained is, the proper cleaning of chimneys, and so long as this object is in some manner attained, it is of no consequence, so far as the public are concerned, whether the work is done by an official or a man not an official.

In order to attain the object, nothing more in the public interest is needed than a system of thorough inspection, and nothing more than what is needed was, I assume, ever intended by the Legislature.

The law is at all times very jealous of interference of any kind with business which is lawful. And there is good reason for this jealousy. The more men there are ready and willing to do particular work, the more cheaply and more efficiently it is usually done.

The great law governing the conduct of man in serving his fellow-men is the law of competition. The less that law is interfered with the better for the general interests of society.

It was a due regard for the freedom of every lawful trade and every lawful calling which prompted the Legislature,

in accordance with the principles of the common law, to declare in sec. 224 of the Municipal Act, that "No council shall have the power to give any person an exclusive right of exercising within the municipality *any trade or calling* * * unless *authorized* or *required* by statute so to do."

The effect of the 4th section of the by-law in question, is, to give the exclusive right to three persons to exercise the calling of chimney sweeps in the city of Toronto, and the consequence of upholding the monopoly is shewn in the fact disclosed in the affidavit for a *certiorari*, that while the by-law allows these favoured sweepers to charge 10, 15, and 20 cents a flue, the defendant is willing and anxious, if permitted, to do the same work at 5, 10, and 15 cents a flue.

To compel the citizens, under pretence of a by-law, to pay to a favoured few for any work much more than they can have that same work done for by others is to legalize extortion.

It is argued that the work is more likely to be well done when done by officials than if done by persons having no official capacity. Such is not, I may venture to say, the experience of mankind generally. The greater the competition for the doing of any work the better it is likely to be done. Men who know that work will come to them whether well or ill-done, are not at all so likely to do it well as those who can only secure it by having a good reputation for doing work well, and can only secure that reputation by working so as to deserve it.

These principles underlie all the decided cases wherein it has been held that by-laws are bad in restraint of trade.

A by-law "that no butcher by trade, though free of the city, shall exercise his trade in the city without being free of the Butchers' Company," was held bad as being in restraint of trade: *Harrison* v. *Godman*, 1 Burr. 14.

A by-law that any person wishing to sell fresh meat in quantities less than a quarter in a shop or stall, should pay $40 as a certificate for authority to sell, was also held to be in restraint of trade: *Snell and the Corporation of the Town of Belleville*, 30 U. C. R. 81.

A by-law for regulating the sale of intoxicating liquors, which provided that druggists might sell such liquors for certain purposes, but required the druggists under a penalty to furnish a quarterly statement, verified by oath, shewing the kind and quantity of liquor sold, and to whom sold, was held to be void as being an unreasonable interference with private business: *City of Clinton* v. *Phillips*, 11 Am. 52.

A by-law that no person not being free of the pewterers company shall exercise the trade of a pewterer within the city of London, was held void as being in restraint of trade: *Chamberlain of London* v. *Compton*, 7 D. & R. 597.

A by-law which provided a particular building for the slaughtering of all animals intended for sale or consumption in the city, and on payment of a fee provided for granting the exclusive right for a specified period to have all such animals slaughtered at that establishment, was held void for a similar reason: *Chicago* v. *Rumpff*, 45 Ill. 90.

And for a similar reason, a by-law that "No person shall keep a slaughter house within the city without the special resolution of the council," was held void: *Re Nash and McCracken*, 33 U. C. R. 181.

A by-law which provides that no other than three chimney inspectors shall sweep or cause to be swept, for hire, any chimneys within the city, must also, I think, for a similar reason be void.

The power is certainly not one to be implied from general language in the Municipal Act, which may or may not cover it. See *Tuckahoe Canal Co.* v. *Tuckahoe & James River R. W. Co.*, 11 Leigh, Va. 42; *Gale* v. *Village of Kalamazoo*, 23 Mich. 344.

It was argued that the power is to be implied from sec. 223 of the Municipal Act, which enables every council to make regulations not specifically provided for by the Act and not contrary to law, for governing the proceedings of the council, &c., and generally such other regulations as the good of the inhabitants of the municipality requires.

The latter words are certainly very general, but I am not prepared to assent to the proposition that the good

of the inhabitants of the City of Toronto requires the continued existence of the 4th section of the by-law in question.

While I admit that the good of the three inhabitants called and known as chimney inspectors, if there be such persons, may require it, I am not at all prepared to admit that the good of the inhabitants generally requires any thing of the kind.

But I am not at liberty to enter into a speculation as to what is good or what is bad for the inhabitants, for the mere purpose of inferring a power which, if granted, would be plainly opposed to sec. 224 of the Municipal Act, and to the principles of the common law.

I must, for similar reasons, hold that there is no such power to be implied from sec. 372 sub-sec. 2, which enables municipal councils to pass by-laws for appointing pound keepers, fence viewers, officers of highways, road surveyors, road commissioners, valuators, and such other officers as are *necessary* to the affairs of the corporation, or for carrying into effect the provisions of any Act of the Legislature.

Chimney inspectors or chimney sweepers are not officers by name mentioned in the section; and chimney sweepers are not, I think, officers *necessary* to the affairs of the corporation. But even if necessary to the affairs of the corporation, *i.e.*, to sweep the flues of chimneys in the city hall or other public building belonging to the corporation, I cannot hold that other property owners shall not be at liberty, as regards their own houses, to do the work by whom they please.

Upon the whole, I must hold that the fourth section of the by-law, which declares that no person other than the chimney inspectors appointed by the municipal council shall sweep or cause to be swept for hire or gain any chimney or flue in the city, is neither authorized or required, nor by the Municipal Institutions' Act, and is altogether beyond the powers of the city corporation.

The conviction of the defendant thereunder cannot

therefore be sustained. The city council exceeded their powers in passing that section of the by-law, and so the police magistrate exceeded his power in convicting under it. See *Regina* v. *Wood*, 5 E. & B. 49; *Re Nash and McCracken*, 33 U. C. R. 181.

Every Judge and every magistrate must, however inconvenient it may be, incidentally determine the validity of every by-law brought before him, in the same manner and to the same extent that he must now decide on the constitutionality of Acts of Parliament.

An Act passed either by the Legislature of the Dominion or of the Province wholly beyond its power, is not law. So a by-law passed by a municipal corporation wholly beyond its power, is no law.

A person accused of violating the provisions of any law, which is in excess of the powers of the body which assumed to pass it, commits no offence against law, and so cannot be properly convicted of having committed any offence against law.

The rule will therefore be absolute to quash the conviction, but without costs, as I find it is not the practice to make such a rule absolute with costs. See *Paley* on Convictions, 5th ed., 437.

Rule absolute.

The Queen v. Slaven.

Conviction—Certiorari—Appeal under 38 *Vic. c.* 11, *O.—Delay—Transmission of papers—Return to certiorari—Duty of Justices.*

S. on the 9th of February, 1875, was convicted before justices of an offence against the Act for the sale of spirituous liquors, 37 Vic. ch. 32, O. On the 27th he obtained a *certiorari* to the justices to return the conviction into the Queen's Bench, which was not served until the 9th of July. In the meantime, on the 3rd of March, he procured a summons from the County Judge by way of appeal from the conviction, under 38 Vic. ch. 11, O, alleging, as a ground for obtaining it so late, that the delay arose wholly from the default of the justices. He persisted in his appeal, notwithstanding the *certiorari*, but the Judge refused to adjudicate on the merits, holding that it had not been made to appear to him that the delay arose wholly from the default of the convicting justices, and therefore that he had no jurisdiction.

On the 13th of September the justices returned to the *certiorari* that before its delivery to them they had at the request of *S.* transmitted the conviction and papers to the County Judge upon the appeal, under 38 Vic. ch. 11, O. In November, *S.*, having procured the papers to be returned by the County Court clerk at Barrie to the magistrates' clerk at Orillia, moved to quash the return to the *certiorari*, and for another writ, or for an attachment for not having returned the conviction in obedience to it, or for an order to return the conviction forthwith, or to amend the return by including the conviction therein. In support of this motion it was urged that the magistrates wrongfully put it out of their power to return the writ by transmitting the papers to the clerk of the County Court when they must have known that the appeal was too late

The application was refused, for *S.*, having procurred the transmission of the papers for his own appeal, could not insist that it was wrong; it was apparent that he had abandoned the *certiorari* in order to carry on his appeal; and when he served the writ he knew that the justices had not the papers to return.

Quære, as to the propriety of the County Court clerk returning the papers to the justices' clerk.

Semble that the justices could not properly have refused to transmit the papers on the ground that the appeal was not made in time; but that on the recognizance being furnished they should transmit them, at least within the month, leaving it to the County Court Judge to decide as to the cause of delay.

On the 9th of February, 1875, John Wallace Slaven was, as is said, convicted before Melville Mellor, mayor of the town of Orillia, George J. Booth, reeve of the said town, A. J. Alport, David L. Sanson, and George J. Bolster, all of the said town of Orillia, justices of the peace, for an offence alleged to have been committed against the provisions of the Act respecting the sale of fermented and spirituous liquors, 37 Vic. ch. 32, O.

On the 27th of the same month he obtained a writ of *certiorari* out of the Court of Queen's Bench addressed to the above named justices, commanding them to return into the said Court all records of conviction had before them wherein the said Slaven was convicted, with all things touching the same. This *certiorari* does not appear to have been served promptly. When it was served did not appear: from a note on the back of it, it might be inferred that it was served upon Mr. Mellor, the mayor, on the 9th of July, 1875.

In the meantime, and after the issuing of the *certiorari*, namely, on the 3rd of March, 1875, Slaven procured a summons from the Judge of the County Court of the county of Simcoe, within which county the conviction was made, by way of appeal from the said conviction, under the 38 Vic. ch. 11, O.

This summons was obtained upon the allegation that the delay arose wholly from the default of the convicting justices, and that at the time of the application being made the proceedings and evidence had been transmitted to the clerk of the County Court of Barrie by the convicting justices; the application for the summons was made to the Judge when on his circuit at Orillia, and the fact was that on that day the conviction and evidence had been mailed to the Clerk of the County Court at Barrie.

Upon the return of the summons, no one appearing for the County Attorney, but counsel appearing for the appellant and also for the prosecutor before the convicting justices, the following preliminary objections were taken by the prosecutor's counsel:

1st. That the request for the transmission of the proceedings and evidence was not made within the five days allowed as required, for although a request was made, yet that the entering into the recognizance required by sec. 2 sub-sec. 3 is a necessary precedent to the request, and the recognizance was only entered into on the 23rd of February.

2nd. That as the application in appeal was made after

the expiration of ten days from the date of the conviction, and it was not shewn that the delay arose wholly from the default of the convicting justices, the County Court Judge had no jurisdiction to entertain the appeal.

Notwithstanding these objections so taken, and that the appellant had then already obtained a *certiorari* to remove all the proceedings into the Queen's Bench, which he had in fact before he applied for the summons, although he had applied for and obtained the *certiorari after* he had served upon the convicting justices the recognizance in appeal and required the proceedings to be transmitted to the county clerk, and although the prosecutor was himself well aware what were the causes of delay in appealing, he persisted with the appeal, and the case was entered into and heard upon the merits subject to these preliminary objections; and evidence was taken with reference to the preliminary objections to enable the Judge to determine whether or not, as was contended on behalf of the appellant, the delay was wholly from the default of the convicting justices.

Evidence was given that after the conviction, but when precisely did not appear, the convicting justices were asked to take bail as a step towards an appeal, but in consequence of their view of the Act they refused to do so.

Subsequently the appellant's solicitor mailed to him, but where he was did not appear, a recognizance to be entered into. The recognizance was duly entered into by the appellant and two sureties at St. Catharines on the 23rd of February. On the 26th of February it was received back by the appellant's solicitor, and on the 27th of February was delivered to the convicting justices with the request that they should transmit the papers to the clerk of the County Court.

While the appellant was taking these steps towards an appeal he was applying on the 26th of February for the *certiorari*, and procured it to issue on the 27th of February, and thereafter proceeded with the appeal until the Judge gave his judgment, refusing to adjudicate upon the merits

of the appeal although they had been fully gone into, upon the ground that the preliminary objections were, in his judgment, fatal to his jurisdiction, inasmuch as the appellant failed to make it appear that the delay arose wholly from the default of the convicting justices. When this judgment was given did not appear, but a copy of it without any date was filed, and from this copy it appeared that the appellant was pressing for an adjudication on the merits of the appeal, insisting that the delay was attributable to the default of the convicting justices, but he failed to impress his view upon the County Court Judge.

Nothing appeared to have been done with the *certiorari* until the 13th of September, 1875, when the convicting justices returned it into the Court of Queen's Bench with a return thereon under their hands and seals, "that long before the delivery of the said writ to them, or either of them, they did at the request of the within named John Wallace Slaven return and transmit to the clerk of the County Court of the County of Simcoe all and singular, the records of conviction within named, and all things touching the same, upon an appeal then made to the Judge of said Court by the said John Wallace Slaven against said conviction pursuant to 38 Vic. ch. 11, and that at the time of the delivery of the said writ to them the said records of conviction &c., &c., were not in any or either of their custody.

Nothing was done upon this return until the 25th of November, 1875, when the appellant Slaven, having procured the papers to be returned by the clerk of the County Court at Barrie on the 30th of October to the clerk of the magistrates at Orillia, made a motion for and obtained a rule *nisi* calling upon the convicting magistrates to shew cause why the return on the writ of *certiorari* should not be quashed and another writ of *certiorari* be awarded to the said parties, commanding them to return all and singular the said record of conviction, with all things touching the same, &c., *or* why a writ of attachment should not isssue against the

said justices for not having in obedience to the said writ returned the said conviction and papers, *or* why the said justices should not be ordered forthwith to return to this Court the said record of conviction and all things touching the same, *or* why the said return should not be amended by including therein the said record of conviction and all things touching the same.

This rule was argued upon the 22nd day of February, 1876. The case was rested upon the material laid before the Court upon the motion for the rule *nisi*.

McCarthy, Q. C., for the applicant Slaven. The notice in appeal having been too late the justices should not have transmitted the papers to the County Court clerk, but should have had them to return with the *certiorari*, and therefore their return should be quashed. And as it is made to appear that the papers were sent back to them on the 3rd of October, they should either amend now their return to the old writ or a new writ should issue.

Osler contra.

March 3, 1876, GWYNNE, J.—I think this rule must be discharged, and that without in any manner impeaching anything said in *Regina* v. *Caswell*, 33 U. C. R. 303.

If this were an application for a *certiorari* in the first instance it is too late, and the writ could not be granted. If therefore the applicant can succeed in this application, it must be on the basis that the original writ is in full force and unanswered, or insufficiently answered.

That the return to the writ is true in fact, and that from the 3rd of March until at least the 30th of October the papers were in possession of the clerk of the County Court, having been transmitted to him by the magistrates for the purposes of the appeal there is no doubt. If then, as is admitted, the return was true in fact, I can see no reason why it should be quashed, unless the truth in fact of the return arose by reason of some contempt committed by the magistrates by which, contrary to what was their duty, the fact had existence.

This is what is contended upon behalf of the applicant, namely: that the justices wrongfully put it out of their power to return the writ as they ought, by transmitting the papers to the clerk of the County Court after, as it is contended, they must have known that the appeal was too late.

But 1st. I do not think it lies in the mouth of the person by whose procurement and for whose appeal the papers were so transmitted, to insist now that the justices were guilty of a wrong, constituting a contempt, so as to authorize and require the Court to quash their return, setting up this transmission of the papers under the appeal to the Clerk of the County Court in their answer to the *certiorari*.

2nd. When the now applicant obtained the *certiorari* it is apparent that he designedly abandoned it for the purpose of carrying on his appeal, and that he prosecuted that appeal as far as he could, insisting that the non-transmission of the papers sooner by the justices was wholly their default, and that therefore he had a right to have the appeal determined on its merits.

3rd. When the applicant served the *certiorari*, and when it was returned, he well knew that the papers were in the office of the County Court clerk for the purposes of the appeal, and that in fact it was not in the power of the justices to return them.

The statute makes no provision for the papers being returned by the clerk of the County Court to the justice's clerk, and I am not clearly satisfied that the latter had any right to receive them, unless it may be that they should be transmitted to him for the purpose of being sent to the Clerk of the Peace, although for what purpose they should be sent to the Clerk of the Peace, the appeal having been taken and being to the Judge of the County Court, is not very clear. However I fail to see any provision in the statute for the County Court clerk parting with them after they came into his possession.

4th. I am not satisfied that it is the duty of the justices

to retain the proceedings and to refuse to forward them, on the request of a person convicted for the purpose of his appeal, upon the ground that the appeal was not duly made within five days from the conviction. The County Court Judge has jurisdiction to issue a summons in appeal at any time within thirty days if it be made to appear to him that the delay in transmitting the proceedings is wholly the default of the justices. It seems but reasonable that the proceedings should be before the County Court Judge when the application is made to him; they might be necessary to enable him to determine whether the delay was or not wholly the default of the justices. The jurisdiction of the County Court Judge to hear the appeal is dependent upon his being satisfied that it was made in time, but I do not think it would be safe for the magistrates to assume, or for the Court to require them to assume the responsibility of determining whether or not the appeal was in time; to adjudicate upon a question as to their own default, and to refuse to transmit the papers. I think the safe way is for the magistrates, upon the recognizance being furnished, to transmit the papers at least at any time within the month leaving the Judge to determine whether any delay which may have arisen is attributable to them or to the appellant; and at any rate, I do not think that the appellant, who caused them to transmit the papers, can now be heard complaining that they did so, and basing his present motion upon the foundation of a wrong committed by the magistrates in complying with his request.

Lastly, I am satisfied that the magistrates conceived they were complying with the directions of the statute, and I am not satisfied that they were not.

I am of opinion, therefore, that their return was good in law and in fact, as it was undoubtedly true, and that it cannot be quashed. The *certiorari* having then a good and valid return upon it cannot have a second one put upon it, at least as a matter of right, and I see nothing to entitle the applicant to any such additional return as a matter of favour, even though the Court may have juris-

diction to order an additional return now to be made to it, as to which I do not at present express an opinion.

It does, however, seems to me that the 12th sec. of 38 Vic. ch. 11 shews that after the expiration of six months from the date of the conviction, the Legislature intended that the conviction should stand absolutely unimpeachable, unless in the meantime it should be altered by a judgment in appeal.

Upon the whole, therefore, as I do not see that the applicant is entitled to prevail as to any part of his motion as a *matter of right*, nor yet as a matter of favour, I shall discharge the rule, and with costs, for the magistrates have acted, I have no doubt, with the utmost good faith, and I cannot see that they have done anything wrong.

Rule discharged.

Regina v. Bradshaw.

Malicious injury to property—Conviction—Appeal—Trial without jury—Legislative power—Proof of malice—32–33 *Vic. c.* 22 *secs.* 29, 66 *; c.* 31 *sec.* 66, *D.*

On the 8th November, 1875, an information was laid against B. before the Police Magistrate of St. Thomas, by one N., under the 32–33 Vic. ch. 22, for having unlawfully and maliciously broken and injured a fence round the land of N. The defence set up was that the fence encroached upon B.'s land, but there was evidence which, if believed, went to shew that B. did not commit the injury under a *bonâ fide* exercise or belief of a right; and the magistrate convicted and fined him. B. appealed to the General Sessions of the Peace, where neither side asked for a jury; the Court urged them to have one, but the respondent, N., refused; and the Court having heard the evidence, decided that B. acted, though mistakenly, under a *bonâ fide* belief that he had a right to remove the fence, and without malice; and they ordered the conviction to be quashed, with costs. N. then applied to quash this order, upon the ground, amongst others, that the case could not be tried without a jury; but, *Held*, that the 32–33 Vic. ch. 31 sec. 66, D., which authorizes the Court to try without a jury, is within the powers of the Dominion Parliament, and that the case having been properly before the Sessions this Court could not review their decision upon the merits.

Sec. 66 of the 32–33 Vic. ch. 22, does not dispense with proof of malice in such cases, but, read in connection with sec. 29, merely means that the malice need not be conceived against the owner of the property injured.

February, 17, 1876. *Hodgins*, Q. C., having had removed by a *certiorari* the proceedings in Quarter Sessions hereinafter referred to, applied upon the part of one Nicoll, the prosecutor of the complaint before the Justice, under the Malicious Injuries to Property Act, 32–33 Vic. ch. 22, for a rule *nisi* calling upon the chairman of the General Sessions of the Peace for the county of Elgin, and Henry Bradshaw, appellant, in the case of *Nicoll* v. *Bradshaw*, to shew cause why the order made by the said Court of General Sessions of the Peace, on the fifteenth day of January last, in the said appeal of Bradshaw, appellant, against Nicoll, respondent, should not be quashed, and why the said cause should not be remitted back to the said Court of General Sessions for trial, and why a writ of mandamus should not issue directed to the said chairman, commanding him to hear the said appeal before a jury, on the ground that under the 66th section of the Act 32–33 Vic. ch. 22, it was not necessary to prove malice by Bradshaw against the owner of the fence, the said Nicoll; and that, therefore, the said Court had jurisdiction to try the same, and because, in any event, malice by Bradshaw against the said Nicoll was proved. 2. On the ground that the said Court had no power to try the said appeal without a jury, and because there was in law and in fact no trial of the said appeal; *or* why a writ of prohibition should not issue commanding the said Court of General Sessions to desist from enforcing the said order in appeal, on the ground that a *bonâ fide* claim of title to land on which the said fence was erected appeared to be and was in question between the said parties in respect of the said fence; *or* why such other order should not be made herein as the Court may think just.

On the 8th November, 1875, Richard B. Nicoll laid an information and complaint under 32–33 Vic. ch. 22, sec. 29, D., before the police magistrate of St. Thomas, against Henry Bradshaw, for that he on or about the 1st day of November, 1875, at St. Thomas, did unlawfully and maliciously break and injure around the burial plot of the said

Richard B. Nicoll, in the Episcopal burying ground, and broke and injured two marble pillars belonging to said fence or railing, the property of the said Richard B. Nicoll. On the 9th day of November, the case was heard before the police magistrate, and the fact of the defendant Bradshaw having pulled down the fence and thereby having done the injury complained of being established, he rested his defence upon the fact that, and called a witness to prove, that the fence encroached upon a piece of land of his, Bradshaw's, where his child lay buried, adjoining the plot belonging to Nicoll; and that in fact Nicoll's fence was partly over the coffin in which Bradshaw's child lay.

There was, however, evidence upon the part of the complainant which, if believed by the magistrate, was calculated to create the impression that the defendant did not commit the injury complained of in the *bonâ fide* exercise of a right or in the *bonâ fide* belief that he had such right. The magistrate convicted the defendant of the offence charged, and adjudged him to pay a fine of $5, over and above the sum of $10 for damages for the injury done, and $6.50 costs and imprisonment for fifteen days in the common jail in default of payment.

The defendant appealed to, and the appeal came on to be heard at the Court of General Sessions of the Peace for the county of Elgin, held on the 14th December, 1875, David John Hughes, Judge of the County Court and Chairman of the Court, presiding.

Neither appellant nor respondent asked that a jury should be empannelled to try the case; on the contrary, when the case was called on, the Court, through their chairman, urged the parties to have a jury empannelled to try it on its merits, but counsel for the respondent, the now applicant for the rule asked for, refused to have a jury, insisting that it was a case more properly to be tried by the Court, and the Court accordingly reluctantly proceeded to try the case without a jury, under the provisions of 32–33 Vic. ch. 31, sec. 66.

The Court, upon hearing and considering the evidence

having arrived at the conclusion that the apppellant Bradshaw acted, although mistakenly, yet in a *bonâ fide* belief that he had a right to remove the fence and without malice, at an adjourned Court of General Sessions of the Peace, held on the 15th January, 1876, the conviction was quashed, and the respondent was ordered to pay the costs of the appeal, amounting to and taxed at the sum of $25.60, to the clerk of the peace, to be by him paid over to the appellant, and that the sum deposited by the appellant, instead of a recognizance, be returned to him by the police magistrate.

This was the order which the complainant before the police magistrate, the respondent in the said appeal now desired to have quashed, and for that purpose made this motion.

March 3, 1876. GWYNNE, J.—The rule must be refused.

This Court does not sit in appeal to review the judgment of the Court of General Sessions sitting in appeal, on the merits upon matters within its jurisdiction. When the defendant Bradshaw, in answer to the complaint before the police magistrate, set up by way of defence that he did what was complained of in the exercise of what he claimed to be his right, it was the duty of the magistrate to inquire whether it was or not in the *bonâ fide* exercise of an actual or supposed right that the defendant committed the act complained of. If he was satisfied that it was, he should have dismissed the complaint. He, however, convicted the defendant, and it is reasonable therefore to assume that the magistrate, rightly or wrongly, formed the opinion that the defendant was not really acting in the *bona fide* exercise of any supposed right, but unlawfully and maliciously, in the words of the statute.

The 66th section of the 32–33 Vic. ch. 22, has not at all the effect attributed to it in the motion filed. It would be strange indeed if it should be unnecessary to prove malice, or to shew facts from which it might be inferred upon an enquiry into a complaint for doing an act "unlawfully and maliciously." The 66th section read with the 29th, merely means that every punishment imposed by the

29th section upon any person *maliciously* committing any offence in that section named, shall be enforced whether the *malice* which constitutes the offence be conceived against the owner of the property in respect of which it shall be committed, or against any other person ; but malice either against the owner or as against some one must be proved or legitimately inferred from the facts in evidence in order to constitute an offence punishable under the Act.

The defendant having been convicted before the police magistrate, had a right of appeal to the General Sessions, and upon such appeal he had a right to insist that the police magistrate erred either in law or in the judgment which he had formed of the facts. In this case the suggestion of error in law and of error in fact involves in reality the same question. He erred in law if he convicted the defendant, believing him notwithstanding to have acted in the *bonâ fide* exercise of a claim of right, and he erred in fact also because the *bonâ fide* exercise of a claim of right excludes the existence of that malice which is essential to sustain the conviction. He did not err if, and only if, he arrived at a proper conclusion upon the evidence on the enquiry whether in truth and in fact the defendant did what was complained of in the *bonâ fide* belief that he had a right to do what he did, and not unlawfully and maliciously as was strongly insisted by the complainant.

The Court of General Sessions must have entertained the appeal. If the complainant, the respondent in appeal, had not refused a jury, insisting that the Court should try the case without a jury, he could have had one.

There is no precedent for this motion upon the ground that it was not tried by a jury, which is really a motion for a new trial, which this Court cannot entertain. It was suggested that the 66th section of 32–33 Vic. ch. 31, which authorizes the Court to proceed without a jury when neither party demands one, is *ultra vires* of the Dominion Parliament, and comes within the clause of the British America Act which places under the jurisdiction of the Local Legislature " the constitution, maintenance,

and organization of Provincial Courts, both civil and criminal."

But the 66th section of 32–33 Vic. ch. 31, comes, in my opinion, within the subject numbered 27, reserved for the jurisdiction of the Dominion Parliament, namely, "criminal law, except constitution of Courts of criminal jurisdiction, but including the *procedure* in criminal matters." The conferring power upon the parties to an appeal in criminal matters to dispense with the jury if they think fit, and to submit themselves to the judgment of the Court of General Sessions without a jury, cannot be said to interfere with the "*constitution of the Court.*" I think moreover that the respondent, who insisted upon the trial without a jury, cannot be heard now to complain of his own act.

The case then being, as it clearly was, properly before the Court of General Sessions in Appeal, and having been adjudicated upon by them, I cannot assume to sit in judgment upon their adjudication. I do not by any means intend to convey that I think their judgment wrong; upon the contrary, reading it, I quite concur in it, and I think it is the one the police magistrate should have arrived at. But I wish to convey that however wrong the judgment in appeal might be, inasmuch as the matter was within the jurisdiction of the Court, neither this nor any other Court can sit in judgment by way of appeal from their judgment and review the merits.

The rule is refused, and it is ordered that the papers removed from the Court of General Sessions with the *certiorari* issued in this matter, be remitted by *procedendo* or otherwise to the Court of General Sessions of the Peace for the county of Elgin, there to be retained and dealt with according to law.

Rule nisi discharged (*a*).

(*a*) Subsequently an application was made for a rule nisi to rehear the foregoing decision, but after consideration, on November 30th, 1876, the rule was refused.

SMITH v. NIAGARA DISTRICT MUTUAL INSURANCE COMPANY.

Insurance—Assignment of policy—Forfeiture by subsequent act of assignor —35 Vic. c. 12, O.; 36 Vic. c. 44, sec. 39, O.

One *G.* insured two houses with defendants, a mutual insurance company, and then mortgaged them to the plaintiff, to whom he assigned the policy with defendants' assent. Afterwards *G.*, in violation of one of the conditions of the policy, executed another mortgage to other persons, of which no notice was given to the defendants. The assignment to the plaintiff was upon the express condition that the plaintiff should be bound by all the conditions of the policy, and that the policy should continue to be voidable as though the assignment had not been made.

Held, that the policy was avoided by *G.'s* act as against the plaintiff, who could recover upon it only in right of *G.*

Burton v. *Gore District Mutual Insurance Co.*, 12 Grant 156, 14 U. C. R. 342, commented upon and distinguished, upon the grounds of the change since made in the law as to assignment of choses in action, by 35 Vic. ch. 12, O., and of the express condition in the assignment, and the provisions of the 36 Vic. ch. 44, sec. 39, O., relating to insurance companies.

DEMURRER. Declaration: upon a policy of insurance to the amount of $1,000, effected by one Givens with the defendants, upon the 1st day of April, 1872, for three years from that date, upon two frame stores, the property of the said Givens: that this policy was made subject to certain by-laws and conditions endorsed thereon (certain of which were set out in the declaration, but of which, as bearing upon the case, the following alone seem to be material):—

"49. Whenever any insured shall alienate conditionally by mortgage, his policy shall be void, unless he shall make a representation thereof in writing to the board within thirty days, stating the amount, and to whom mortgaged, who shall have power to give their assent to said mortgage or to cancel said policy, as they shall judge fit on examination; and if assented to by the directors the same shall be endorsed on the policy, and signed by the president and secretary."

The declaration then averred, that Givens, by and with the consent of the defendants recorded on the policy under the signature of the president and secretary of the defen-

dants, assigned, transferred, and set over the said policy, and all his interest in the same, to the plaintiff, to secure to him the payment of a mortgage made by the said Givens to the said plaintiff on the said property, for $1,761.67 and interest at the rate of 8 per cent. per annum: that the said Givens at the time of the making of the said policy, and thence until and at the time of the damage and loss thereinafter mentioned, was interested in the said premises so insured as aforesaid, and that the plaintiff at the time of the assigning the said policy to him, and thence until and at the time of the damage and loss thereinafter mentioned, was interested in the said premises so insured as aforesaid to the amount so insured thereon; and afterwards the insured premises were burned and destroyed by fire; and all things have happened to entitle the plaintiff to maintain this action, yet defendants have not paid, &c.

Plea: that the assignment and transfer of the policy in the declaration mentioned to the plaintiff, was accepted by the plaintiff subject to the condition that the plaintiff should be bound by all the terms and conditions of the said policy, and the by-laws endorsed thereon, in as full and ample a manner as the said Givens was theretofore bound by the same, and that the said policy should continue to be voidable as though the said assignment had not been executed: that the assignment took place on the 28th October, 1873, and that afterwards, on the 11th March, 1874, Givens granted and assigned the said insured premises in fee by way of mortgage unto John Green and John B. Laing and others, to secure payment of the sum of $3,290.00, as therein mentioned; and although after the said mortgage was made more than thirty days elapsed before the alleged loss, yet no notice whatever of the said mortgage was ever given to the defendants, nor did they assent thereto; by reason whereof the plea insisted that the said policy has become void.

The replication to this plea merely repeated what appeared by the plea, namely, that the mortgage executed by Givens to Green and Laing was subsequent to the

assignment of the policy to the plaintiff and to the defendants' assent thereto; and the replication insisted merely as a point of law, that the making of the said mortgage to Green and Laing, who were third parties claiming a different interest in the premises, did not make void the policy so assigned to the plaintiff.

The defendants demurred to this replication, as neither traversing or confessing and avoiding the plea, and as only repeating some of the facts in the plea stated as an answer to the plea.

The plaintiff filed exceptions to the plea, such exceptions being in substance what was relied upon in the replication—namely, that the mortgage to Green and Laing appearing by the plea to be subsequent to the plaintiff's mortgage, and subsequent to the defendants' consent to the assignment of the policy by Givens to the plaintiff, cannot avoid that policy.

February 16, 1876. The demurrer was argued by *Tilt*, for the plaintiff, and *Osler*, for the defendant.

March 13, 1876. GWYNNE, J.—The short substance of this pleading is, that Givens being seised in fee of the two stores, insured them for $1,000, and then mortgaged the insured premises to the plaintiff to secure $1,761.67, and that the defendants assented to this mortgage and to the assignment of the policy to the plaintiff, and that afterwards the mortgagor, in violation of a condition endorsed on the policy, and subject to which it was entered into, executed another mortgage to other persons to secure $3,290, of which no notice whatever was given to the defendants, and so as to avoid the policy if it had never been assigned. A thing therefore which the defendants conceived themselves to be so interested in guarding against being done, that they made it a condition whereon the policy was entered into that if done without their assenting to it the policy should be avoided, has been done; and the question is, will this breach of condition, which would

have avoided the policy in the hands of the original insurer, avoid it or not in the hands of the plaintiff, who is only assignee of the original insurer?

The plaintiff's contention is, that it will not, and *Burton* v. *The Gore District Mutual Fire Ins. Co.*, 12 Grant 156, is the only case upon which he rests his contention.

If this case were to be governed by *Burton* v. *The Gore District Mutual Fire Ins. Co.*, I should feel very much perplexed, for neither the report of that case, as determined in the Court of Queen's Bench, 14 U. C. R. 342, nor in the Court of Chancery, as reported in 12 Grant 156, is to my mind at all satisfactory.

In the case in the Queen's Bench, Sir John Robinson, C. J., was of opinion that the 19th sec. of 6 Wm. IV. ch. 18, did not apply to an alienee by way of mortgage from a person having an insurance upon a house, and that the plaintiffs in that case held no more favourable position than that of being assignees of a chose in action. From this opinion it flowed, as a logical sequence, that the policy could be avoided by an act of the original insurer in breach of a condition endorsed upon and made part of the policy. Burns and McLean, JJ., however, were of opinion that the 19th section of the Act did include a mortgagee, and, consequently, that the plaintiffs were competent to maintain the suit in their own names. They were, nevertheless, of the same opinion with the Chief Justice upon the point, that the act of the original insurer avoided the policy.

Now, with the utmost deference to these learned Judges, I must say that it seems to me that the logical sequence resulting upon holding that a mortgagee came within this 19th section was, that the plaintiffs in that case were entitled to recover, notwithstanding the act of the mortgagor complained of in the third plea.

The 19th section of that Act, which is the same as the 30th section of ch. 52 of the Consol. Stat. of U. C., enacts that: "In case any house or other building be alienated by sale or otherwise, the policy shall be void and shall be surrendered to the directors of the company to be

cancelled, and thereupon the assured shall be entitled to receive his deposit note or notes upon payment of his proportion of all losses and expenses that had accrued prior to such surrender, but the grantee or alienee may have the policy assigned to him, and upon application to the directors such alienee, on giving proper security to their satisfaction for such portion of the deposit or premium note as remains unpaid, and with their consent, within thirty days next after such alienation, may have the policy ratified and confirmed to him for his own use and benefit, and by such ratification and confirmation the party causing the same shall be entitled to all the rights and privileges and be subject to all the liabilities to which the original party was entitled and subjected."

Now, it is to be observed that to effect the purpose here indicated, the assignment in fact of the policy by the original insurer is wholly unnecessary. Indeed, the first thing necessary to enable the mortgagee to effect the insurance provided by the section is, that the policy should be avoided, and should be surrendered to the company to be cancelled, and that the original insurer should cease to be insured in the company and to be a member thereof, he being liable only to his proportion of all losses and expenses incurred prior to the surrender of the policy by him. It is true that the Act makes use of the not very appropriate language, that "the grantee or alienee may have the policy assigned to him;" but this language does not, as it seems to me, point to an assignment in fact by the original insurer of a policy having no longer any validity, as passing any interest in the policy to the grantee or alienee; but what is meant is, that, notwithstanding the policy is avoided and cancelled, the grantee or alienee of the property may obtain the benefit of the policy in the following manner—namely, by application to the directors within thirty days from the alienation of the property to him, and by giving security for so much of the surrendered premium note as remains unpaid, he may have the cancelled policy brought into existence again, and with renewed vigour ratified and

confirmed to him as a member of the company, in the place and stead of the original insurer; and thenceforth the policy so renewed, ratified, and confirmed, shall operate as a new insurance made with the grantee or alienee, who shall be treated as thenceforth the original insurer, with whose policy the former insurer, whose policy was cancelled and who himself was no longer a member of the company, could have nothing to do; and of consequence that the new policy so effected could not be avoided by any act of a person no longer in any way a party to it.

Now, in *Burton* v. *The Gore District Mutual Ins. Co.*, the plaintiffs shewed by their declaration that they gave security to the company for so much of the premium note as remained unpaid, that they had been accepted as members of the company, and that they had the policy ratified and confirmed to their own use under this 19th section. They sufficiently shewed, as I think, that by such ratification and confirmation a new policy was in effect entered into with them to their own use and benefit; so that if they, as mortgagees, were within the purview of this section, they should have been regarded as having effected an insurance of their own interest only as mortgagees, in which the mortgagor—his policy having been cancelled and his premium note no longer binding, and he no longer a member of the company—should have been held to have had no interest whatever, and that beyond their interest as mortgagees the policy had no effect, and that, therefore, it was not in the mortgagor's power by any act of his to avoid a policy effected by the mortgagees upon their own interest.

This, I confess, appears to me to have been the logical conclusion resulting from holding that mortgagees were within the 19th section of the Act. However, I concur with Sir John B. Robinson, and with all the Judges of the Court of Chancery, that a mortgagee is not an alienee within the meaning of that section, it being intended to apply to absolute alienees only, who could more consistently with the nature and principles of mutual insurance be-

come members of the company in lieu and stead of the original proprietor.

In the Court of Chancery it was held that the case was the ordinary case of an assignment of a policy with the assent of the company insuring, and that the doctrine of the Court of Chancery in such a case is, that the assent to the assignment creates a new and that an equitable contract of insurance between the assignee and the company, and that thenceforward the assignee is the insured; and that if the assignee is a creditor merely of the owner of the policy, and takes the assignment as a mortgagee, he becomes the assured to the extent of his debt only. I confess that if it were not for this decision, which, so far as I have been able to find, is not based upon the authority of any decided case, I should have thought it beyond doubt that consent to the *assignment of a policy* of insurance having *legal existence* involved in terms a necessity for the *continuing existence of the thing assigned*—namely, the legal contract—although it may be in whole or in part only for the benefit of the assignee; and that, like the assignment of any other chose in action, the assignee acquired no greater right to recover thereunder than was consistent with the terms of the contract, and as could be asserted by or on behalf of the assignor, the only difference between the position of the assignee at law and in equity being, that in equity he could sue in his own name, whereas at law he could only sue in the name of his assignor; but, whether in equity or at law, he could only recover in right of the assignor. I cannot understand how a party's consent to the assignment by one person to another of a legal contract in existence with the former can operate as the destruction of the thing agreed to be assigned, and the substitution in its stead of a wholly new contract having no legal existence, but having a new birth in equity, wholly relieved and discharged from those conditions and safeguards which, for the protection of the party assenting to its assignment, surrounded its legal existence.

The observations of Lord Westbury in *Rolt* v. *White*, 9

Jur. N. S. 343, 345-6, I should have thought as applicable to the assignment of a policy of fire insurance, once it is assented to, as to the assignment of any other chose in action. He says there: "It is true undoubtedly that a chose in action is assignable, subject to the equities affecting the assignees; but this is also true, that if the chose in action consists of a legal right to recover and obtain payment of money, that legal right is transferred to the assignees, and they are simply in the same position and subject to the same conditions by which the assignor could sue under it." So that when the assignee of a legal contract sues in equity, he could only recover upon the strength of the legal rights of his assignor.

The decision, however, in the Court of Chancery was rested upon what was said to be the status and condition of an assignee of a chose in action in the Court of Chancery, and the law there expounded was what is called the law of the Court of Chancery as the creature of the Court itself, as distinguished from the law of the land.

Since that time the status and condition of assignees of choses in action are placed upon a different footing; they have a status and condition assigned to them by the statute law of the land, and for all matters touching their rights, privileges, and liabilities, we must henceforth look to the statute law, the construction of which in all Courts must be uniform according to the terms expressed in the statute.

By 35 Vic. ch. 12, sec. 1 O., it is enacted that "Every debt and *chose in action arising out of contract* shall be assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as may be contained in the original contract; *and the assignee thereof, shall sue thereon* in his own name in such action, *and for such relief as the original holder* or assignor of *such chose in action* would be entitled to sue for in any Court of law in this Province."

Then there is the Act 36 Vic. ch. 44, O., entitled, "An Act to consolidate and amend the laws having reference to

Mutual Fire Insurance Companies in the Province of Ontario." To the 39th section of this Act, which in terms is identical with the 30th section of ch. 52 Consol. Stat. U. C., and to the 19th section of 6 Wm. IV. ch. 18, as far as those sections go, the Legislature has added this provision following, "Provided, however, that in cases where the assignee is a mortgagee, the directors may permit the policy to remain in force, and to be transferred to him by way of additional security, without requiring any premium note or undertaking from such assignee, or his becoming in any manner personally liable for premiums or otherwise; but in such cases the premium note or undertaking and liability of the mortgagor in respect thereof shall continue in no wise affected" by the assignment.

Now here the defendants plead, and this is not denied, that the plaintiff accepted the assignment and transfer of the policy which Givens had with the defendants upon the express condition that the plaintiff should be bound by all the terms and conditions of the said policy and the by-laws endorsed thereon, and that the *said policy should continue to be voidable as though the said assignment had not been executed.*

By force of these recent statutes, therefore, to which I have referred, and of this term alleged in the plea to have been expressly contained in the assignment of the policy, to which the defendants assented, it must be held, notwithstanding the decision in *Burton* v. *The Gore District Mutual Fire Ins. Co.*, that the original legal contract is still the contract in force, which, notwithstanding the assignment, may be avoided by any act of the person thereby insured that, in the terms of the contract, it is provided shall avoid the policy, and that the present plaintiff can only recover under the policy in right of Givens. And this I take to be the law of England as laid down in *Rolt* v. *White*, 9 Jur. N. S. 343. If it were otherwise, the plaintiff in this case might claim a right to recover even though the insured property had been destroyed by arson committed by the mortgagor.

In *Chishom* v. *The Provincial Insurance Co.*, 20 C. P. 11, we held that an assignee of a policy, who sued thereon in the name of the assignor, could not by an equitable replication, which asserted an interest somewhat similar to what is asserted here in the declaration, displace a plea that the premises were destroyed by the arson of the assignor.

A mortgagee has no right whatever, as it appears to me, to complain of such a construction being put upon an assignment to him by his mortgagor of a policy effected by the latter; for the mortgagee has it always in his power to protect himself by a policy in respect of his own interest directly effected by himself to the extent of his debt. In such a policy the mortgagor would have no interest, and upon payment of the debt insured by the policy to the mortgagee, the insurance company would become entitled to an assignment of the mortgage. When, instead of taking this mode of protecting himself, the mortgagee is content to take an assignment of a legal contract already in existence, it is but reasonable to hold that he takes the contract subject to all its incidents, and that he is content to trust in the person who is the party to the contract doing nothing to avoid it. It being admitted upon these pleadings that this policy would be avoided for the cause assigned if the action were brought by Givens in his own right, I must hold that it is equally so when the action is brought by his assignee.

Judgment for defendants.

In re Thomas Brodie and the Corporation of the Town of Bowmanville.

Sale of liquors—Tavern and shop licenses—39 Vic. c. 26, O.

A by-law of a town, passed under the 39 Vic. ch, 26, sec. 2, sub-sec. 3, O., limiting the number of shop licenses to be issued in the town to one, and directing the holder of such license to confine the business of his shop exclusively to the keeping and selling of liquor: *Held*, bad, as being in effect prohibitory and creating a monopoly.

A provision that the duties to be paid for a tavern license in the town should be $100, and for a shop license $200: *Held*, to mean that the sums mentioned should include the government duty, and therefore to to be within the power of the council, under sec. 16, sub-sec. 2.

It was also provided, 1: That in all places in the town licensed to sell intoxicating liquors, no sale or other disposal thereof should take place therein after 7 on Saturday night until 6 on Monday morning, nor on any other day between 10 P.M. and 6 A.M.; and that during these hours the bars of all taverns should be kept closed.

2. That the holder of a tavern or shop license should not be permitted to sell intoxicating liquor at any other than the house for which he had received a license, except that in case of his removal to another house the inspector might endorse his permission on the license.

Held, beyond the jurisdiction of the council, as being an exercise of the powers transferred by the Act, sec. 1, to the Board of License Commissioners.

A provision that no sale, &c., of any intoxicating liquor should be made in any licensed tavern or shop to any child, servant, or apprentice, without the consent of a parent, master, or legal guardian: *Held*, valid, for being authorized by the Municipal Act, 36 Vic. ch. 48, sec. 379, sub-sec. 31, independently of the 37 Vic. ch. 32, O., the power was not transferred to the commissioners.

A clause, that no gambling, profane swearing, blasphemous or grossly insulting language, or any indecency or disorderly conduct, should be permitted in any licensed tavern or shop: *Held*, also valid, as being authorized by the Municipal Act, sec. 379, sub-secs. 33, 36, and by the general police power of the council.

It was held no objection that the by-law contained no limit to its duration, as that was determined by the statute 39 Vic. ch. 26, sec. 2 sub-sec. 3, secs. 6, 12.

March 31, 1876, *C. Robinson*, Q. C., obtained a rule *nisi*, calling on the Corporation of the Town of Bowmanville to shew cause why by-law No. 275, passed by the said corporation on the 29th February last, intituled "A by-law to limit the number of tavern and shop licenses to be issued in the town of Bowmanville, and for other purposes," should not be quashed, in whole or in part, with costs, on the grounds:—

1. That the second clause of the by-law, limiting the number of shop licenses to one, is unreasonable, and inconsistent with the intent and object of the powers given to the said corporation, and is in effect an attempt to prohibit absolutely the sales of wines and spirituous liquors in shops in the said town, and in effect gives to one shop-keeper, to be licensed thereunder, a monopoly or exclusive right of selling liquor as such shop-keeper within the said town, and is beyond the jurisdiction of the said corporation to ordain.

2. That as to sections 5, 6, 7, 8, and 9, they are beyond the power of the said corporation to enact, and are, or some one or more of them is, unreasonable and oppressive.

3. That the duties required to be paid by section 4 are excessive and beyond the powers of the corporation.

4. That the said by-law is unlimited as to its duration, or the time for which it shall remain in force, and is in this respect beyond the authority of the corporation.

And on grounds disclosed in affidavits and papers filed.

The by-law was as follows :—

Sec. 1 not moved against, limits the tavern licenses to 5.

Sec. 2 provides that the shop license shall be limited to one and no more, "and the holder of such shop license shall confine the business of his shop solely and exclusively to the keeping and selling of liquor."

Sec. 3 is not moved against, and provides for the accommodation to be furnished by hotels, &c.

Sec. 4. "That the duties to be paid for a tavern license * * shall be $100, and the duties to be paid for a shop license shall be $200."

Sec. 5. "That in all places * * licensed to sell intoxicating liquors, no sale or other disposal of such liquors shall take place * * to any person or persons whomsoever, from or after the hour of seven o'clock on Saturday night, till the hour of six o'clock on Monday morning thereafter, nor on any other day than the aforementioned days, from or after the hour of ten o'clock at night, till the hour of six o'clock in the morning thereafter."

Sec. 6. "That during the hours * * wherein the sale or other disposal of liquor is by statute or this by-law prohibited, the bar room or bar rooms of all taverns shall be kept closed."

Sec. 7. "That no sale or other disposal or gift of any intoxicating liquor shall be made in any licensed tavern or shop * * to any child, servant, or apprentice, without the consent of a parent, master, or legal protector."

Sec. 8. "That no gambling, profane swearing, obscene, blasphemous, or grossly insulting language, or any indecency or disorderly conduct, shall be permitted in any licensed tavern or shop."

Sec. 9. "That the holder of a tavern or shop license shall not be permitted to sell intoxicating liquors at any other than the house for which he has received a license, except that should he desire to remove from the house for which he has received such license to another house in the said town, then the inspector of licenses may indorse his permission on the said license."

Sec. 10 provides penalties for the infraction of the by-law, and Sec. 11 repeals inconsistent by-laws.

It appeared from the affidavits and papers filed that the population of the town of Bowmanville, at the time of the passing of the by-law, was 3,300: that there were six licensed taverns wherein spirituous liquors were sold, and two licensed shops wherein spirituous liquors were sold by retail: that the town is situate territorially within the township of Darlington: that the population of Darlington exceeded 4,800, excluding Bowmanville: that the town of Bowmanville is three miles in length and two and a half miles in width: that the township of Darlington is thirteen miles in length and ten miles in width; and that in the township of Darlington there is no shop licensed for the sale of spirituous liquors by retail.

April 4, 1876, *Loscombe* shewed cause.
C. Robinson, Q. C., supported the rule.

April 11, 1876. HARRISON, C. J.—A superintending

power of a judicial character is necessary to be exercised in order to keep municipal bodies within legal and reasonable limits in the exercise of the powers delegated to them by the Legislature.

There has always been such a power where English law has prevailed; without it great oppression might be exercised and great confusion created.

It is a description of control from which any Court to whom it is committed would rather be relieved.

In the nature of things, the Legislature could not exercise the control so as to meet the exigency of each particular case. It is for that and other reasons vested in the judiciary. And the Judges must exercise it under the same sense of responsibility as they discharge their other duties: See per Robinson, C. J., *Re Barclay and the Municipality of the Township of Darlington*, 12 U. C. R. 92.

The municipal powers are not only limited, but must be reasonably exercised, and not only strictly within the limits conferred by the Legislature, but in perfect subordination to the general law of the land: Per Dickenson, J., in *Waters* v. *Leech*, 3 Ark. 110, 115.

There must not be any unnecessary interference with trade: *Dunham* v. *City of Rochester*, 5 Cow. 462; the sanctity of private business: *Trustees of the Village of Clinton* v. *Phillips*, 11 Am. 52; or liberty of the subject: *Mayor of Memphis* v. *Winfield*, 8 Humph. 707.

The cases of *Calder & Hebble Navigation Co.* v. *Pilling*, 14 M. & W. 76; *Elwood* v. *Bullock*, 6 Q. B. 383; *Baker* v. *Municipal Council of Paris*, 10 U. C. R. 621; *Regina* v. *Belmont*, 35 U. C. R. 298; and *Re Slavin and the Corporation of the Village of Orillia*, 36 U. C. R. 159, shew the caution which the Courts of England and of Canada feel it incumbent on them to exercise in preventing any unreasonable or unwarrantable extension of the legislative power committed to municipal bodies, and in taking care that the authority to alter the law of the land in matters of general application shall be confined to the proper legislative body.

The sale of intoxicating drink has for many years, both in England and Canada, been placed, and wisely placed, under stringent and special legislation: See per Wilson, J., *In re Ross and the Corporation of the United Counties of York and Peel*, 14 C. P. 171, 174.

There may be either prohibition or regulation, and to the extent that prohibition or regulation is authorized; although interfering with the trade or traffic of selling intoxicating liquors, the law must be respected and obeyed.

Prohibition can, under the existing laws, only be enacted after vote of the people. But regulation may be enacted independently of the direct will of the people.

If a by-law really prohibitory in its character be passed under the pretence of being merely a regulation, the by-law will be quashed: *In re Barclay and the Municipality of the Township of Darlington*, 12 U. C. R. 86.

So long as the Legislature has not made the retailing spirituous liquors in shops and taverns illegal, no municipality can accomplish the same end in any other manner than by such a proceeding as the Legislature has prescribed: Per Robinson, C. J., *In re Greystock and the Municpality of Otonabee*, 12 U. C. R. 458, 461.

The regulation is effected through and by means of licenses granted for the sale of spirituous liquors, either by wholesale or retail, and if by retail, in shops and taverns.

The licenses required, although called shop and tavern licenses, are not restricted to houses of any particular denomination; but the language used in the Act 37 Vic. ch. 32, O., is intended to cover the sale of spirituous liquors in any and every house or place, under certain conditions and in a particular manner; the intention of the Legislature being three fold—for revenue purposes, the accommodation of the public, and to prevent houses in which such liquors are sold being under the management of improper persons: Per Morrison, J., in *Re Grand and The Corporation of the Town of Guelph*, 27 U. C. R. 46, 51.

It is difficult for the municipal authorities to enforce regulations for the orderly keeping of licensed houses, as

well as to meet the devices parties may resort to for the purpose of evading and contravening them: Per Morrison, J., in *Regina* v. *Belmont*, 35 U. C. R. 298, 301.

This difficulty in the past on the part of the municipal authorities is the cause of the passing of the Act of last session of the Legislature of the Province, intituled, "An Act to amend the law respecting the sale of fermented or spirituous liquors:" 39 Vic. ch. 26.

The great feature of that Act is the creation in each city, county, or union of counties, of a board of license commissioners, composed of three persons, to be appointed from time to time by the Lieutenant Governor in Council, for each city, county, or union of counties, or electoral riding or division, as the Lieutenant-Governor in Council may think fit. The office is honorary and without any remuneration.

All powers and duties conferred and imposed by the previous Act, 37 Vic. ch. 32, O., upon commissioners of police and municipal councils respectively, are hereafter exclusively to belong to and be exercised and performed by the board of license commissioners, except where express provision is to the contrary made in the Act.

The provisions to the contrary made in the Act are few. These are as follow:—

1. The powers of councils of cities, towns, villages, or townships, to limit the number of tavern licenses to be issued in the city, town, village, or township municipality: 39 Vic. ch. 26, sec. 2, sub-sec. 3.

2. The council of a city, town, village, or township municipality, may by by-law to be passed before the 1st March in any year, limit the number of shop licenses to be granted therein for the then ensuing year, and in such by-law, or by any other by-law passed before the said day, may require the shopkeeper to confine the business of his shop solely and exclusively to the keeping and selling of liquor, or impose any restrictions upon the mode of carrying on such traffic as the council may think fit: Sec. 12.

3. The power of the council of a city or town by by-law,

to be passed before 1st day of March in any year, to prescribe any requirements in addition to those under 37 Vic. ch. 32, or this Act, required as to the accommodation to be possessed by taverns or houses of public entertainment: Sec. 6.

4. The power of the council of a city, town, village, or, township, to pass a by-law requiring a larger duty to be paid for shop or tavern licenses than prescribed by section 16 of the Act, but not in excess of $200 in the whole, unless the by-law has been approved by the electors: Sec. 16, sub-secs. 2, 3; see further sec. 19, at the end.

The 1st section of the by-law moved against, which limits the number of tavern licenses to be issued in the town of Bowmanville to five, was clearly within the power of the council at the time of passing of the by-law, and is not specifically attacked.

The 2nd section, which limits the number of shop licenses to be issued in the town of Bowmanville to one, and no more, and directing the holder of such a license to confine the business of his shop solely and exclusively to the keeping and selling of liquor, is attacked on the ground that it is in effect prohibitory, and at all events creates a monopoly.

This objection is well taken, on the authority of *Re Barclay and the Municipality of the Township of Darlington*, 12 U. C. R. 86; *Greystock and the Municipality of Otonabee*, Ib. 458, and *Terry* v. *the Municipality of Haldimand*, 15 U. C. R. 380.

In the first two cases by-laws limiting the number of tavern licenses to one were held to be illegal. In the last case the by-law provided for the issue of two shop licenses, and though attacked was sustained.

Sir John B. Robinson in delivering judgment said, p. 383: "This by-law allows the licensing of two shops to retail liquors in a township, in which there are four licensed taverns besides. Then there is competition allowed. The privilege is not confined to *one* person, but is literally given to *a number of persons*, though to be sure the

smallest number possible, if there are to be more than one."

Section 2 of the by-law must therefore be quashed with costs.

Section 3, which provides for the accommodation that shall be required in licensed taverns, is apparently authorized by section 6 of the Act of last session, and is not specifically attacked.

Section 4 is specifically attacked. It provides that the duties to be paid for a tavern license in the said town shall be $100, and the duties to be paid for a shop license shall be $200.

The ground of the attack is, that the duties required to be paid are excessive and beyond the powers of the council of the corporation.

It was provided by sec. 22 of 37 Vic. ch. 32, O., that "Over and above the sum which may be imposed by municipalities as by law provided, there shall be paid for each *tavern* license, to and for the use of Her Majesty * * in cities a duty of $30; in towns, $25; in townships and incorporated villages, $15; * * for each shop license by retail, in cities, $30; in towns, $25; and in townships and incorporated villages, $15."

It was also provided by section 23 of the same Act that "The sum to be paid for a tavern or shop license, in addition to the provincial duty mentioned in the last preceding section, shall be such a sum as shall be fixed by a by-law of the municipality passed by the proper authority in that behalf; and, including the provincial duty, shall be, in cities, not less than $80 for taverns or shops; in towns, not less than $60 for taverns and for shops; and in townships and incorporated villages, not less than $30 for each tavern and shop license."

The latter section also declared that no by-law by which a greater sum than $130 per annum is intended to be exacted for any tavern or shop license, &c., shall have any force or effect unless the by-law before the final passing thereof shall have been duly approved by the electors of the municipality.

It is by sub sec. 1 of sec. 16 of the Act of last session declared that the following duties shall hereafter be payable, and shall be in lieu of all others, provincial or municipal: "Each wholesale license, $150; each shop license in cities, $100; in towns, $80; and in other municipalities, $60. For each tavern license in cities, $100; in towns, $80; and in other municipalities, $60."

But sub-sec. 2 of sec. 16 of the same Act empowers the council of any municipality, by by-law, to require a larger sum to be paid for tavern or shop licenses therein, not in excess of $200 in the whole, unless the by-law has been approved by the electors under sec. 22 and sec. 23 of the 37 Vic. ch. 32.

The duty is now in all cases to be paid to the Inspector, an officer appointed by the Lieutenant-Governor in Council: Sec. 17 of the Act of last session.

I do not think I can read sec. 4 of the by-law moved against otherwise than as providing $100 and $200 for tavern and shop licenses respectively in the whole—that is, as including the Government duty, and so reading it I hold that section 4 of the by-law is not in excess of the powers of the council.

So much of the rule as asks to quash section 4 of the by-law with costs must therefore be discharged with costs.

Sections 5 and 6 of the by-law are also specifically attacked.

Section 5 provides that in all places in the town of Bowmanville licensed to sell intoxicating liquors, no sale or other disposal of such liquors shall take place therein or on the premises thereof, or out or from the same to any person or persons whomsoever, from and after the hour of seven o'clock on Saturday night till the hour of six o'clock on Monday morning thereafter, nor on any other days than the aforementioned days from or after the hour of ten o'clock at night till the hour of six o'clock in the morning thereafter.

Section 6 provides that during the hours and times wherein the sale or other disposal of liquors is by statute

or this by-law prohibited, the bar or bar rooms of all taverns shall be kept closed.

These sections are attacked on the ground that they are beyond the power of the municipal council, and are unreasonable and oppressive.

It is provided by section 28 of 37 Vic. ch. 32, O., that in all places where intoxicating liquors are or may be sold by wholesale or retail, no sale or other disposal of the said liquors shall take place therein or on the premises thereof, or out of or from the same, to any person or persons whomsoever, from or after the hour of seven o'clock on Saturday night till six o'clock on Monday morning thereafter, and during any further time on the said days, and any hours on other days during which by any statute in force in this Province, or by any by-law in force in the municipality where such place or places may be situate, the same, or the bar room or bar rooms thereof ought to be kept closed, save and except in cases where a requisition for medicinal purposes, signed by a licensed medical practitioner or by a justice of the peace, is produced by the vendee or his agent, &c.

Before the passing of the Act of last session it was undoubtedly in the power of the town council, under the section last mentioned, to have passed such a by-law as the portions of the by-law now attacked and under consideration: See *Re Bright and the City of Toronto*, 12 C. P. 433. But this power not being by the Act of last session expressly reserved to municipal councils, must be taken to have been transferred by that Act to the board of license commissioners, and now exclusively to belong to and be exercised by that board: See section 1 of the Act.

Sections 5 and 6 of the by-law must therefore be quashed with costs.

Section 7 of the by-law provides that no sale or other disposal or gift of any intoxicating liquor shall be made in any licensed tavern or shop in the town of Bowmanville to any child, servant or apprentice, without the consent of a parent, master or legal guardian.

The ground of attack is, that it is beyond the power of the council and is oppressive and unreasonable.

A municipal council, in the absence of express legislative power, is not authorized to pass such a by-law as contained in the foregoing provision: See *Re Barclay and the Municipality of the Township of Darlington*, 12 U. C. R. 86. See further *Re Ross* v. *The Corporation of the United Counties of York and Peel*, 14 C. P. 171. But express legislative power for the purpose now exists: See. 36 Vic. ch. 48, sec. 379, sub-sec. 31; *Harrison's* Mun. Man. 3rd ed., 327.

And inasmuch as the power to pass such a by-law exists independently of the 37 Vic. ch. 22, the power has not been transferred by the Act of last session to the board of license commissioners. It still remains with the municipal councils, and is neither oppressive nor unreasonable.

So much of the rule *nisi*, therefore, as asks to have section 7 of the by-law quashed with costs, must be discharged with costs.

Section 8 of the by-law is also attacked. It provides that no gambling, profane swearing, blasphemous or grossly insulting language, or any indecency or disorderly conduct shall be permitted in any licensed tavern or shop in the town of Bowmanville.

The ground of attack is, that the enactment is beyond the power of the council.

It is by sub-sec. 33 of sec. 379 of 36 Vic. ch. 48, O., provided that the council of every city, town, township, and incorporated village shall have power to pass by-laws for preventing vice, drunkenness, profane swearing, obscene, blasphemous, or grossly insulting language, and other immorality and indecency.

So under sub-sec. 36 of the same section by-laws may be passed for suppressing gambling houses and for seizing and destroying faro banks, rouge et noir, roulette tables, and other devices for gambling found therein.

Besides, it is by sec. 36 of 37 Vic. ch. 32, O., provided that the mayor or police magistrate of a town or city, or the reeve of a township or village, with any one justice of the

peace or any two justices of the peace having jurisdiction in the township or village, upon complaint made on oath to them or one of them respectively, that any keeper of any inn, tavern, ale-house, beer-house, or other house of public entertainment situate within their jurisdiction, sanctions or allows gambling or riotous or disorderly conduct in his tavern or house, may summon the keeper and investigate the same summarily, with consequences, in event of conviction, not necessary to be here mentioned. See further 38 Vic. ch. 41, D.

And it seems to me that independently of these provisions or of anything contained in 37 Vic. ch. 32, O., that municipal councils have as the guardians of public morals a police power to prevent gambling, profane swearing, blasphemous or grossly insulting language, indecency or disorderly conduct in a licensed tavern or shop or other place of public resort in the municipality.

It was on this principle held in *Re Ross* v. *The Corporation of the United Counties of York and Peel*, 14 C. P. 171, that without express legislative power municipal councils may pass by-laws to prevent the sale of intoxicating liquors to idiots and insane persons.

I do not think that the powers assumed in section 8 of the by-law moved against can properly be said in any manner or to any extent to depend for their existence on 37 Vic. ch. 32; and this being so, no transfer of the power has been by the Act of last session made to the board of license commissioners.

So much of the rule as asks to quash section 8 of the by-law must therefore be discharged with costs.

Section 9 of the by-law provides that the holder of a tavern or shop license shall not be permitted to sell intoxicating liquor at any other than the house for which he has received a license, except that should he desire to remove from the house for which he has received such license to another house in the said town, then the inspector of licenses may endorse his permission on the license.

This section is attacked on the ground that it is now beyond the power of the council.

It is provided by section 18 of the 37 Vic. ch. 32, O., that any inspector of licenses may in his discretion, but after resolution allowing the same of the municipal council or commissioners of police, as the case may be, having jurisdiction, and subject to the approval of the issuer of licenses, endorse on any tavern or shop license permission to the holder thereof or his assigns or legal representatives to remove from the house to which said license applies to another house to be described in an endorsement to be made by the said inspector on the said license, &c.

The inspector is now an officer appointed by the Lieutenant-Governor in Council, and not by the municipal councils, as before the Act of last session: 39 Vic. ch. 26, sec. 17.

The power of the inspector under sec. 18 of 37 Vic. ch. 32, O., is made to depend on the resolution of the council or commissioners of police.

The power to pass such a resolution is, I think, under the Act of last session transferred from the municipal councils to the board of license commissioners, who now have the general power as to granting licenses for the sale of intoxicating liquors either by wholesale or retail.

The power to license the sale of intoxicating liquors involves the power to restrict the sale to the house or place mentioned in the license, subject to the change from house to house, as provided for by sec. 18 of 37 Vic. ch. 32: See *Re Grand and The Corporation of the Town of Guelph*, 27 U. C. R. 46.

I have, therefore, come to the conclusion that section 9 of the by-law moved against must be quashed with costs.

Section 10 of the by-law is not specifically attacked, and as it is divisible, it is clearly applicable to so much of the by-law as is not quashed, and to that extent good.

All that now remains for consideration is, the attack made against the whole by-law on the ground that the by-law is unlimited as to its duration, or the time for which it shall remain in force, and is in this respect beyond the authority of the council of the corporation.

There is, in my opinion, nothing in this objection.

The by-law on the face of it has, it is true, no limit to its duration, but its duration must depend on the several provisions of law applicable thereto.

The power under sub-sec. 3 of sec. 2 of the Act of last session is to limit the number of tavern licenses to be issued in the municipality for the ensuing year, or for any future year, "until the by-law be repealed or altered."

The power under section 6 of the same Act is, before the first of March in any year, to pass by-laws as to additional accommodation. These by-laws "shall continue in full force for such year and any future year until repealed."

The power under section 12 of the same Act is, before the first of March in any year, to pass a by-law limiting the number of shop licenses. These by-laws "shall remain in force for any future year until repealed."

All such by-laws and all provisions of all such by-laws, unless the contrary be expressed or there be something on the face of the by-laws to limit their duration, remain in force until repealed.

So far as the last objection is concerned, it must be overruled, and the rule *nisi* as to it be discharged with costs.

The rule *nisi*, therefore, is in part absolute with costs, and in part discharged with costs; and the costs must, as far as possible, be apportioned accordingly: See *Snell and The Corporation of the Town of Belleville*, 30 U. C. R. 81.

Rule accordingly.

In re Thomas Arkell and The Corporation of the Town of St. Thomas.

Tavern and shop licenses—Billiard tables—39 Vic. c. 26; 36 Vic. c. 48, sec. 379, sub-secs. 3, 31, 35, 36, O.

A clause in a town by-law for the regulation of taverns and shops licensed to sell spirituous liquors, prescribing the hours during which liquors should not be sold, or the bar-rooms kept open: *Held*, unauthorized, following *Brodie and The Corporation of Bowmanville*, ante, p. 580.

A prohibition in the by-law against the giving of liquor to any minor or apprentice without a *written* order from his guardian or master: *Held*, good, for the statute authorizes the requirement of a consent, and the condition as to its being written was not open to objection.

A provision that no billiard table or bowling alley should be licensed or kept in any such tavern, inn, or house of entertainment. *Held*, authorized by the power given to the corporations to regulate billiard tables and bowling alleys: 36 Vic. ch. 48, secs. 379, sub-secs. 3, 35, 36, O.

A provision that in all shops where liquor is sold no sale shall take place between 7 p.m. and 7 a.m. *Held*, valid, under 39 Vic. ch. 26, sec. 12, O.

April 7, 1876, *C. Robinson*, Q. C., on behalf of Thomas Arkell, obtained a rule *nisi* calling on the corporation of the town of St. Thomas to shew cause why the by-law passed by them on the 29th day of February, 1876, for regulating taverns, shops, and other places to be licensed in the town of St. Thomas for the sale by retail of spirituous, fermented, or other intoxicating liquors, and for limiting the number of taverns, should not be quashed, wholly or in part, with costs; on the grounds: 1. That by clause 1 the number of tavern licenses to be granted as prescribed by the statute is exceeded, and the by-law is in that respect beyond the power of the corporation. 2. That the 3rd, 4th, 5th, and 7th clauses of the by-law or some one of them are or is *ultra vires*, unreasonable, oppressive, and illegal. 3. That the 6th clause of the said by-law is illegal, in this, that the duty thereby imposed is excessive and beyond the power of the said corporation. 4. That the 8th clause of the said by-law prescribes a period of imprisonment in excess of the authority of the said corporation, and is illegal and beyond the power of the corporation.

A verified copy of the by-law was filed, the material portions of which are as follows :—

1. That there shall not be more than thirteen taverns or inns licensed in this town, and that four of the applicants for any such licenses may be exempted from having the accommodation as to beds and stables required for taverns or inns.

3. That in all taverns or inns where intoxicating liquors are or may be sold no sale or other disposal of the said liquors shall take place therein, or on the premises thereof, from after the hour of 10 of the clock p. m. till 7 a. m. thereafter, and the bar-room or bar-rooms thereof shall be closed up and kept closed during such hours, and during any other hours or days, which by any statute in force in this Province the room ought to be kept closed, save and except where a requisition for medical purposes, signed by a licensed medical practitioner or by a justice of the peace, is produced by the vendee or his agent, or to a *bonâ fide* traveller.

4. That no gambling, &c., shall be allowed in such taverns &c., under a penalty of not less than $10 and not more than $50, with costs of conviction.

5. That no tavern-keeper shall give to any minor or apprentice under the age of fifteen any intoxicating liquor, without a written order from his guardian or master. And no such person shall suffer tippling or unnecessary drinking on or about the premises, and shall not give liquor to intoxicated persons; and no billiard table or bowling-alley shall be licensed or kept in any such tavern, inn, or house of entertainment, or in the premises attached thereto.

6. The sum of $200 shall be the duty payable for each shop and tavern license, &c.

7. That in all shops where liquor is or may be sold by retail, the keeper or owner thereof shall confine the business thereof solely and exclusively to the sale or other disposal of such liquor, and no sale of said liquor shall take place after the hour of 7 p.m., till 7 a.m., provided that this section shall not come into force till the 1st day of November, 1876.

8. Any person guilty of a breach of any of the provisions of this by-law, (not before provided for) shall be liable on conviction to be fined in any sum, not less than $1, and not more than $50, exclusive of costs; and in case of non-payment of fine and costs, the same shall be levied by distress of the goods of the offender, and in case of no sufficient distress, the offender shall be liable to imprisonment in the common gaol of the county of Elgin, with or without hard labour, for any period not exceeding thirty days.

An affidavit of Henry Ellis, clerk of the council, filed on behalf of the council, shewed that in the original by-law the period of imprisonment was twenty days, and that the word "thirty" in the certified copy was an error of the copyist.

April 25, 1876. The rule was argued before Hagarty, C. J. C. P., sitting alone.

Osler for the corporation. The objections to sections 1, 6 and 9, are abandoned. Section 2 is not attacked. We do not attempt to support section 3. It is bad under the authority of *Re Brodie and the Corporation of the Town of Bowmanville*, 38 U. C. R. 580. Sections 4 and 5 are good under the same case. See, also, *Re Ross and the Corporation of the United Counties of York and Peel*, 14 C. P. 171; 36 Vic. ch. 48, sec. 379, sub-secs. 33, 36. As to the regulation as to billiard tables, see sec. 379, sub-secs. 3, 35, 36; *Re Neilly and the Corporation of the Town of Owen Sound*, 37 U. C. R. 289. The 7th section is valid: *Re Bright and the City of Toronto*, 12 C. P. 433.

C. Robinson, Q. C., contra, relied chiefly on *Re Brodie and The Corporation of the Town of Bowmanville*, 38 U. C. R. 580, as to the objections taken by him in the rule, and which he had not abandoned. He relied on the objection as to billiard tables, contending that the corporation had no right to insert such a clause in a by-law of this character.

April 28, 1876. HAGARTY, C. J. C. P.—The objections to sec. 1 were abandoned.

Section 3. Mr. Osler admits this section cannot be supported against the recent decision of Harrison, C. J., in *Brodie and The Municipality of Bowmanville*, 38 U. C. R. 580. So long as this decision stands it is conceded we should follow it. Section 3 must therefore be quashed.

Section 4 is admitted to be good on this last case.

Section 5 prohibits the giving of liquor to any minor or apprentice without a written order from parent, master, or guardian. The Municipal Act of 1873, sec. 379, sub-sec. 31, authorizes the council to prevent the sale or gift of drink to a child, apprentice or servant, without the consent of parent, master, or legal protector. The only variance here complained of is the requirement in the by-law that the consent should be written. This objection was not very confidently urged. I am not disposed to hold that the introduction of this word shall vitiate the clause. To make the provision effective no doubt the written consent or order is the wisest provision, and would prevent contradictory evidence as to the fact. When the power is to prevent an act being done without consent I decline holding that the prohibition may not be without written consent. It merely affects the evidence of consent.

The same section goes on to say "and no billiard table or bowling alley shall be licensed or kept in any such tavern, inn, or house of entertainment, or on the premises attached thereto." Mr. Robinson strongly urged that this provision should not be found in a by-law of this character for the regulation of taverns and shops. He concedes the right of the council to regulate the licensing of billiard tables.

I am of opinion that the council have the power to declare that no billiard table kept for hire or gain shall be allowed in any inn or tavern, &c. I had occasion to consider this subject in the case of *Re Neilly and the Corporation of the Town of Owen Sound*, not yet, I believe, reported *(a)*.

(a) Since reported, 37 U. C. R. 289.

Conceding that they can pass a by-law as to licensing of billiard tables, and to prohibit them in taverns, I do not see why I am to hold it to be bad in a by-law for the regulation of taverns, to declare that these tables shall not be kept in taverns. This provision can hardly affect any existing license. I hardly think it dealing fairly with municipalities to subject their by-laws to a scrutiny unreasonably rigid. I think this section five must stand.

Section 6 is not now attacked.

Section 7. The first objection, as to confining the business in licensed shops to liquor keeping and selling, is not pressed, the words of the Act being clear. But it is said that the council cannot restrict the hours of business to between 7 a.m. and 7 p.m. The last statute, 39 Vic. ch. 26, sec. 12, O., declares that the municipality may limit the number of shop licenses, and "may require the shopkeeper to confine his business solely and exclusively to the keeping and selling of liquor, or may impose any restrictions upon the mode of carrying on such traffic as the council may think fit, and such by-law shall be binding upon the license commissioners," &c. It is only necessary to hold this power existing in the case of shop licenses, leaving it undecided as to taverns.

It seems to me impossible, in the face of these large powers, to entertain the objections now urged. It may be that inconsistencies may be pointed out in the Act, but these words seem to me to be too clear on the point. The general power to regulate may be given to the commissioners, but express authority is also given to the council to act by by-law before the 1st of March in each year, and this by-law shall bind the commissioners. I express no opinion on the points admitted to be decided in *Brodie's Case.*

The result will be, that the rule is absolute to quash section three.

It is admitted that in the last section there is a clerical error in the copy of the by-law in stating thirty days as the limit of imprisonment. The number in the original is twenty.

The relator is to have his general costs. But in taxation any costs shewn to be incurred by the attack on the sections that have been held good may be allowed in reduction thereof. This does not apply to the last section.

Rule accordingly.

In re Uriah Donelly and the Corporation of the Township of Clarke.

Tavern Licenses.

A Township Corporation cannot make the sum payable for tavern licenses vary according to the locality; as, in certain villages named $100, and elsewhere in the municipality $75. Such a distinction is contrary to the spirit, at least, of sec. 24 of the Municipal Act, 36 Vic. ch. 48, O.

April 18, 1876. *Henry O'Brien* obtained a rule *nisi* calling on the corporation to shew cause why by-law No. 156 of the said corporation, entitled a by-law to limit the number of tavern and shop licenses and the duties payable for the same in the municipality of Clarke, passed on the 28th February last, should not be quashed in whole or in part on the grounds: 1. That the second clause, limiting the number of shop licenses to one, is unreasonable, illegal, and inconsistent with the powers intended to be given to said corporation; and is in effect an attempt to prohibit absolutely the sale of wines and liquors in shops in the said municipality, and would create a monopoly, and is *ultra vires*. 2. That the third clause, which makes a distinction as to the amount to be paid for tavern licenses in different localities, is unreasonable, unjust, and beyond the jurisdiction of the said corporation, and because the corporation had no jurisdiction to fix a larger duty in the villages of Orono, Kendall, and Newtonville, than in any other locality, and that such distinction is contrary to the spirit and intent of the statute.

The second and third sections of the by-law were as follows :—

2nd. That in accordance with the provisions of the above recited Act (39 Vic. ch. 26, O., passed February 10, 1876), the limit of the number of licenses to be issued in this municipality for the ensuing year shall be one, and that the person obtaining such shop license shall be required to confine the business of his shop solely and exclusively to the keeping and selling of liquors, and that the duty fixed for such shop license shall be $100.

3rd. That the duties fixed and payable for tavern licenses in this municipality shall be as follows :—In the villages of Orono, Kendall, and Newtonville, $100; elsewhere in the municipality, $75.

April 25, 1876. *St. John Hutcheson* supported the rule. No cause was shewn on behalf of the corporation.

April 28, 1876. HAGARTY, C. J. C. P.—The second section must be quashed, on the principle on which the late case of *Re Brodie and the Corporation of the Town of Bowmanville,* 38 U. C. R. 580, was decided.

I do not see how it can be allowed to the council to make the amount payable for a license, tavern or shop, to depend on the part of the municipality in which the applicant may happen to live. The Legislature allows a council to discriminate as to the amount payable in cities and in towns, and then generally as to other municipalities. But this by-law of a township enacts a larger amount to be paid in certain named villages than in the rest of the municipality.

This distinction is, I think, unwarranted. It seems to come within the spirit, at least, of sec. 224 of the Municipal Act of 1873, which prohibits as well the giving to any person the exclusive right of exercising within the municipality any trade or calling, as the imposing of a special tax on any person exercising the same.

They cannot, on the one hand, give to any one person within their jurisdiction the exclusive right to have a tavern or a shop license; and, on the other hand, they must

not make him pay more or less according to the place in which he may happen to reside, except when specially permitted by statute. To hold otherwise would, I think, be very unfair, both in principle and in practice.

I think section 3 must be quashed. So much of section 2 as limits the number of shop licenses to one must also be quashed.

The relator must have his costs.

Rule absolute.

LEYS V. WITHROW AND HILLOCK.

Assignment in trust for creditors—Action by creditor against trustees—Transfer of suit to Chancery—Administration of Justice Act, 1873, *secs.* 2, 9.

The declaration alleged, in substance, that the plaintiff was assignee of a mortgage made by one G. W. M. for $2015, on which default had been made, by which the whole principal became due: that G. W. M. was in business in partnership with H. W. M., and becoming embarrassed they assigned all their estate, real and personal, to defendants, in trust to sell the same and distribute the proceeds ratably among their creditors, including the plaintiff: that the defendants had sold the estate, and held the proceeds in trust for the plaintiff and other creditors, and held moneys applicable to the amount due to the plaintiff, and were aware and had notice of the plaintiff's claim, but refused to pay the plaintiff any part of such proceeds: that defendants had realised all the estate, and had long been in a position to divide and pay the same among the creditors, and had in fact paid some of them; and that the greatest portion of the estate so assigned was the sole property of G. W. M.

Held, not a proper case in which to proceed at law under the Administration of Justice Act, 1873, 36 Vic. ch. 8, sec. 2, O., it being impossible in a Court of law to administer the trust and do complete justice without having all the parties interested in the trust before the Court; and the suit was therefore transferred, under sec. 9, to the Court of Chancery.

DEMURRER. Declaration: for that by a certain indenture by way of mortgage, bearing date on or about the 30th of September, 1872, and which mortgage was made, in pursuance of the Act respecting short forms of mortgage, between one George William Mace, of the first part, Eliza Mace, wife of the said G. W. M., made a party for the purpose of barring her dower, of the second part, and one John Clarence Gray, of the third part, the said G. W. M. did,

for the consideration of the sum of $2,015, which the said G. W. M., by the said indenture, acknowledged had been received by him from the said J. C. G., grant and mortgage unto the said J. C. G., his heirs and assigns for ever, all and singular those certain parcels or tracts of land and premises, being composed of lots 5, 8, and 9, on a plan or sub-division of lot 7, in the 2nd concession from the bay, in the township of York, and containing 31 acres more or less. And in and by the said indenture of mortgage it was and is provided that the said mortgage should be void on payment of $2,015, with interest at seven per cent. per annum, as follows:—the said sum of $2,015 in ten equal annual instalments, with interest on the whole of the said sum of $2,015 remaining unpaid, half yearly, the first of such annual payments of principal to have been made on the 1st day of September, 1874, and the succeeding payments of principal on the 1st day of the month of September in each and every year until the whole of the said sum of $2,015 should be paid. And the said G. W. M. did in and by the said mortgage, for himself, his heirs, executors, administrators, or assigns, covenant, promise, and agree to and with the said J. C. G., his executors, administrators, and assigns, that he, the said G. W. M., his heirs, executors, administrators, or assigns, would pay to the said J. C. G., his heirs, executors, administrators, or assigns the said sum of $2,015 and interest, at the rate aforesaid, on the days and in the manner aforesaid. And in and by the said mortgage it was and is provided, and agreed and understood by and between the said G. W. M., his heirs, &c., and the said J. C. G., his executors, &c., that in default of the payment of the interest secured by the said mortgage, by the time and in the manner provided by the said mortgage, the said principal sum of $2,015 should forthwith become payable: the said G. W. M. duly executed the said mortgage: subsequently, and by a certain indenture, bearing date on or about the 8th day of February, 1873, and made between the said J. C. G., of the first part, and the plaintiff, of the second part, the said J. C. G. did assign, transfer, and set

over unto the said plaintiff, her executors and assigns, the said mortgage, and the said sum of $2,015, and the interest secured and payable upon the said mortgage, and all benefit and advantage to be derived from the said mortgage in respect to any provisoes, covenants and agreements therein contained, and did grant unto the said plaintiff, and to her heirs and assigns, the said lands and premises, whereby the said plaintiff became, and was and still is entitled to receive the said sum of $2,015, and interest thereon at seven per cent. per annum. One instalment of the said principal money, amounting to $201.50, became due and payable on the 1st day of September, 1874, and a second instalment of the said principal money became due and payable on the 1st day of September, 1875, and one half year's interest upon the said sum of $2,015, amounting to the sum of $70.52, became due and payable on or about the 30th day of September, 1875. The said G. W. M. has not, nor has any one on his behalf, nor have the defendants, paid or satisfied the said two instalments of principal so due and payable upon the said mortgage, nor paid the interest so due and payable; but the whole sum of $2,015, with interest thereon at seven per cent. per annum from 31st day of March, 1875, is due and owing under or by virtue of the said mortgage, and by reason of such default the whole of the said principal sum of $2,015 has become due and payable. The said G. W. M. was in business in partnership with one Henry William Mace, and he and the said H. W. M. were before and at the time of the execution of the indenture of agreement next hereinafter referred to in embarrassed circumstances, and unable to pay their or either of their debts in full, and in order to distribute their assets proportionately amongst their creditors respectively, including the plaintiff, they, the said G. W. M. and H. W. M., by a certain indenture or agreement in writing, and which is in the words or figures, or to the purport and effect following:

"This assignment, made between G. W. M. and H. W. M. of the city of Toronto, builders, of the first part, and John Withrow and John Hillock, of the same place, lum-

ber dealers, of the second part, witnesses that the said parties of the first part have assigned and hereby do assign to the said parties of the second part, all their estate and effects, real and personal, of every nature and kind whatsoever, to have and to hold to the parties of the second part as assignees on trust to sell and dispose of the same, and otherwise to realize the assets of the said parties of the first part, and distribute the proceeds ratably among the creditors of the said parties of the first part, including the said parties of the second part: In witness whereof, the parties hereto have hereunto set their hands and seals, the day and year first above written. G. MACE & SON."

H. W. Mace did assign all his estate and effects, real and personal, of every nature and kind whatsoever, unto the defendants in trust, to sell and dispose of and otherwise to realize the same, and to distribute the proceeds thereof ratably amongst the creditors of the said G. W. M. and H. W. M. At and before the time of the execution of the said agreement, the plaintiff was and she still is one of the creditors of the said G. W. M. and H. W. M., and was and still is one of the creditors for whose benefit the said G. W. M. and H. W. M. assigned to the defendants their real and personal estate as aforesaid, and she accepted the trusts of the said agreement. The defendants accepted the trusts reposed in them by the said agreement, and entered into and took possession of the estate, real and personal, of the said G. W. M. and H. W. M., and the defendants have sold and disposed, and realized the same, and have received and still hold the proceeds thereof, and hold such proceeds in trust for the benefit of the plaintiff and the other creditors of the said G. W. M. and H. W. M., and the defendants hold in their hands proceeds of the said real and personal estate, moneys applicable to the payment of the amount due to the plaintiff. The plaintiff gave the defendants notice of the indebtedness to her by the said G. W. M., under the said mortgage, at or about the time of the execution of the said agreement, and during the time the defendants had the real and personal estate of the said G. W. M. in their possession and control. The defendants had

full notice and knowledge of the said mortgage, and that the plaintiff was a creditor of the said G. W. M. under the said mortgage. The said plaintiff has frequently applied to the defendants for payment of the said sum of $2,015, and interest thereon at the rate of seven per centum per annum, and for payment of the dividends to which she was and is entitled out of the real and personal estate so assigned by the said G. W. M. and H. W. M. to the defendants, as one of the creditors of the said G. W. M., but the defendants have neglected and refused, and still neglect and refuse to pay the plaintiff any part of the proceeds of the real and personal estate of the said G. W. M. and H. W. M., so assigned to them as aforesaid. The said defendants have realized and got in all the estate of the said G. W. M. and H. W. M., so assigned to them as aforesaid, and have long since been in a position to divide and pay the same to the creditors of the G. W. M. and H. W. M., and have in fact paid some of the said creditors. The greatest portion of the real and personal estate so assigned by the said G. W. M. and H. W. M. to the defendants was the sole property of the said G. W. M.

Demurrer, on the grounds that the declaration does not disclose any equitable cause of action on the part of the plaintiff alone against the defendants : nor does it shew the existence of a a purely money demand within the meaning of the Administration of Justice Act, (1873.) If the plaintiff can maintain this action, there is nothing to prevent the defendants from being harassed with a suit at the instance of each joint and separate creditor of the said G. W. M. and H. W M. and being compelled to take the accounts of their trust with every such creditor. The plaintiff is a separate creditor of the said G. W. M., and seeks to be paid her claim out of the joint estate assigned to the defendants. The said count prays for no specific relief against the defendants other than the judgment of the plaintiff's claim in full, or of a dividend thereon.

Joinder.

March 14, 1876, the demurrer was argued. *Foster*, for the defendant.

The plaintiff has no legal cause of action and no equitable cause of action in herself alone. This is not a purely money demand under the Administration of Justice Act: *Soules* v. *Soules*, 35 U. C. R. 334. He also referred to *Taylor* v. *Brodie*, 21 Grant 607; *Baker* v. *Dawbarn*, 19 Grant 113.

McMichael, Q. C., contra. If we have a claim it is no answer to say that it is subject to be paid after other claims are paid. The fact that if our action lies, the defendants may be sued by many persons, is a question of convenience. The plaintiff's claim is evidently a purely money demand.

March 28, 1876. HARRISON, C. J.—The declaration shews that the plaintiff is the assignee of a mortgage, dated 30th September, 1872, made by George William Mace, on land in the township of York: that the mortgage is in default: that the mortgagor was in business, in partnership with one Henry William Mace: that the partnership became embarrassed, and the two partners assigned to the defendants all their estate and effects, real and personal, in trust, to sell and dispose of the same, and otherwise to realize the assets, and distribute the proceeds ratably among the creditors of the partners: that the defendants accepted the trusts and realized the same, and have received and still hold the proceeds thereof "in trust for the benefit of the plaintiff and the other creditors" of the partners, and the plaintiff has frequently applied to the defendants for the payment of the mortgage money, but the defendants have neglected and refused to pay the plaintiff any part of the proceeds of the real and personal estate of the partners so assigned, although the defendants have long since been in a position to divide and pay the same to the creditors, concluding with an averment that the greatest portion of the real and personal estate so assigned was the sole property of the mortgagor.

The plaintiff in substance declares that the defendants are trustees of the partnership: that the plaintiff is a creditor having a claim against one of the partners individually: and that the trustees neglect and refuse to pay any portion

of the plaintiff's demand against the individual partner, although possessed of assets.

This declaration is a novelty in a Court of law. It is attempted to support it on the ground that the plaintiff is, under section 2 of 36 Vic. ch. 8, a person having "a purely money demand."

It is clear that before the Administration of Justice Act such a declaration would have been bad in a Court of law, for as said by Rolfe, B., in *Pardoe* v. *Price*, 16 M. & W. 451, 458: "It is quite clear that, so long as no other relation subsists between two parties except that of trustee and *cestui que trust*, no action can be maintained by the latter against the former for any money in his hands. The trustee is, in such a case, the only person at law entitled to the money, and the remedy of the *cestui que trust* is exclusively in a Court of equity. When, indeed, there is no trust to execute, except that of paying over money to the *cestui que trust*, the trustee, by his conduct, as, for instance, by admission that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law at the suit of the *cestui que trust*, for money had and received, or for money due on account stated. * * * A contrary doctrine might often deprive the trustee of many grounds of defence which would be available to him in equity; equitable set-off, for instance, or other equitable claims against the *cestui que trust*, which in good conscience ought to be available to him, and would be so in a Court of equity, but which would afford no legal defence." See further *Deeks et ux.* v. *Strutt*, 5 T. R. 690; *Jones* v. *Tanner*, 7 B. & C. 542; *Edwards* v. *Bales*, 7 M. & G. 590; *Remon* v. *Hayward*, 2 A. & E. 666; *Roper* v. *Holland*, 3 A. & E. 99; *Bartlett* v. *Diamond*, 14 M. & W. 49; *Bird* v. *Peagrum*, 13 C. B. 639; *Sloper* v. *Cottrel*, 6 E. & B. 497; *Topham* v. *Morecraft*, 8 E. & B. 972; *Cadbury* v. *Smith*, L. R. 9 Eq. 37; *Fleet et al.* v. *Perrins*, L. R. 3 Q. B. 536; S. C., L. R. 4 Q. B. 500; *Soules* v. *Soules*, 35 U. C. R. 334.

It is argued by the trustees that if the plaintiff can maintain this action at law there is nothing to prevent the

defendants from being harassed with a suit at the instance of each joint and separate creditor of the partnership, and being compelled to take the accounts in each and every such suit; and besides, that it appears that the plaintiff is a separate creditor seeking to be paid out of the joint estate, without shewing that the creditors of the joint estate have been satisfied.

There is much force in these objections.

It has long been settled in bankruptcy that the joint estate is to be applied in payment of the joint debts and the separate estate in payment of the separate debts, any surplus estate there may be of either estate being carried over to the other. Per Lord Justice Turner, in *Lodge* v. *Prichard*, 1 DeG. J. & S. 613. See also *Baker* v. *Dawbarn*, 19 Grant 113.

It is impossible in a Court of law, without having all the parties interested in the trust before the Court, to administer the trust and do complete justice to all parties.

For this reason I have come to the conclusion that this is a proper case to be transferred to the Court of Chancery under sec. 9 of the Administration of Justice Act. That section declares that "in case it appear to a Court of law or to a Judge thereof, that any equitable question raised in any action or other proceeding at law cannot be dealt with by a Court of law, so as to do complete justice between the parties, or may, for any other reason, be more conveniently dealt with in Chancery, the Court or a Judge may order the action or proceedings to be transferred to the Court of Chancery, and such order of transference may be made by the Court or Judge, *suâ sponte*, or upon the application of either party on notice to the other parties interested."

I shall therefore, as the statute directs, order the action to be transferred to the Court of Chancery, to be dealt with by that Court, making no order as to the costs; but leaving it to the Court of Chancery, if it see fit in the ultimate disposal of the cause; to make an order as to the costs of the proceedings at law and of the transfer of the cause from the one Court to the other.

Rule accordingly.

The Bank of Hamilton v. The Western Assurance Company.

Policy of insurance effected by S.—Loss payable to plaintiffs—Right of plaintiffs to sue—36 Vic. ch. 8, sec. 2.

The declaration on a policy of insurance alleged that defendants agreed to insure one S. against loss on wheat and flour owned by the assured, and that the amount of loss, if any, should be paid by defendants to the plaintiffs. It then averred that the policy was delivered by defendants to plaintiffs, and that thence until and at the time of the loss the plaintiffs were interested in the wheat and flour to the amount insured.

Held, that the declaration shewed sufficient to entitle the plaintiffs to sue in their own name, for the plaintiffs' interest was sufficiently averred, and their claim was a purely money demand, for which, though an equitable one, they were entitled under the Administration of Justice Act, 36 Vic. ch. 8, sec. 2, to proceed at law.

Declaration. First count: on a policy of insurance dated 24th February, 1875, whereby the defendants agreed with one John Small to insure him against loss or damage by fire to the amount of $1,500, on wheat and flour owned by the assured, for the period of four months from the hour of 12 o'clock, noon, on 24th February, 1875, and that the amount of the loss, if any, should be paid by the defendants to the plaintiffs. It averred that the policy was delivered by defendants to plaintiffs, and thence, until, and at the time of the damage and loss after mentioned, the plaintiffs were interested in the wheat and flour to the amount insured. Then followed an averment of the loss by of the wheat and flour to the amount insured, and the usual averment of performance of all conditions precedent. Breach: non-payment by the defendants to the plaintiffs of the amount of the damage and loss.

Second count on a similar policy of insurance, dated 23rd March, 1875, for $500, on wheat. It contained similar averments as to the ownership of the wheat, delivery of policy to the plaintiffs, interest of the plaintiffs, and loss.

The defendants demurred to each count, on the grounds:

1. The declaration alleges that the policy was made between the defendants and John Small, and shews no privity of contract between plaintiffs and defendants nor any legal or equitable cause of action in the plaintiffs.

2. The declaration does not shew that John Small had any insurable interest at the time of the making of the policy.

3. The plaintiffs' right to recover is an equitable one, and is not of such a nature that it can be recovered in an action at law.

March 28, 1876. *J. Lockhart Gordon* for the demurrer. He referred to *Orchard* v. *The Ætna Ins. Co.*, 5 C. P. 445, 449; *Every* v. *Provincial Ins. Co.*, 10 C. P. 20; *McCollum* v. *Ætna Ins. Co.*, 20 C. P. 289; *Livingstone* v. *The Western Ins. Co.*, 16 Gr. 9; *Soules* v. *Soules*, 35 U. C. R. 334; *Angell* on Insurance sec. 7.

McMichael, Q. C., contra, contended that the statement in the declaration "on wheat and flour owned by the assured," was a sufficient averment of interest in Small, and that sufficient privity was shewn between Small, and the plaintiffs: citing *Richards* v. *Liverpool and London Ins. Co.*, 25 U. C. R. 400.

April 4, 1876. HARRISON, C. J.—The contract of fire insurance is in general a contract of indemnity: see *Powles et al.* v. *Innes*, 11 M. & W. 10; *Chapman* v. *Pole* 22 L. T. N. S. 306; *Dalby* v. *The India & London Life Ass. Co.*, 15 C. B. 365.

The indemnity is generally promised in money, and generally claimed in money. See *Sunderland Marine Ins. Co.* v. *Kearney* 16 Q. B. 925; *Livingstone* v. *The Western Ass. Co.*, 14 Grant 461, 463.

In fire policies usually there is a provision to the effect that the insurers may, if they see fit, instead of paying the money rebuild or restore the property insured: *Bunyon* on Fire Ins. 94. It has been held in the United States that the company has no right to rebuild or replace articles lost unless such right is expressly given in the policy: *Wallace* v. *Insurance*, 4 La. 289. There is nothing in this case to shew that the policy contains any such provision.

To sustain an action upon such a contract, being one of indemnity, it must be made to appear that the person claiming payment of the amount of the loss has sustained loss.

A person who has no interest at the time of the loss in the subject matter of the insurance cannot properly be said to have sustained any loss by its destruction or injury.

Interest therefore of some kind, commonly called an insurable interest, in the subject matter of the loss is necessary to entitle the person claiming the loss to recover.

For this reason a mere agent or stranger to the policy has in general no right whatever to sue for the loss: *Bunyon* on Ins., 2nd ed., 15.

But a mortgagee or other person making advances on the subject matter of the insurance has undoubtedly an insurable interest, and so has the mortgagor. Their interests are different, but each of its kind is an insurable interest: *Richards* v. *Liverpool and London Fire, &c., Ins. Co.*, 25 U. C. R. 400.

In actions on policies of insurance the interest of the assured may be averred thus: "That A, B, C, and D, (or some or one of them) were or was interested," &c.: Rule of Pleading 9, *Harrison*, C. L. P. Act, 2nd ed., 719.

And it may also be averred "that the insurance was made for the use and benefit and on the account of the persons so interested": *Ib.*

One of the objections to the declaration is, that it does not shew that John Small had any insurable interest at the time of the making of the policy.

The declaration avers that the wheat and flour, the subject matter of the insurance, was owned by the assured, apparently meaning Small. See *Livingstone* v. *The Western Ins. Co.*, 14 Grant 461, S. C. 16 Grant 9.

The nature of his interest at the time of the making of the policy is therefore shewn.

There is no objection to the effect that he is not shewn to have been interested at the time of the loss. Nor is it objected that the plaintiffs are not shewn to have been interested.

If the latter objection had been made it would not have been good, for the declaration expressly avers that the plaintiffs were interested in the wheat and flour, the subject matter of the insurance.

The nature of their interest is not shewn. But enough is shewn to establish that they were not mere strangers to the subject-matter of the insurance, having no interest therein.

The declaration is good, as against any objection taken for the want of any averment of interest.

The real objection, and the more formidable one, is, that the right of the plaintiffs to recover is an equitable one, and is not of such a nature that it can be sustained in an action at law.

Without doubt this objection would at one time have been a good one. See *Orchard* v. *The Ætna Ins. Co.*, 5 C. P. 445; *Every* v. *The Provincial Ins. Co.*, 10 C. P. 20; *McCollum* v. *The Ætna Ins. Co.*, 20 C. P. 289.

So would the objection that the plaintiffs are the assignees of a chose in action, and not entitled to sue in their own name at law, at one time have been a good objection: *Beemer* v. *The Anchor Ins. Co.*, 16 U. C. R. 485; *Davies* v. *The Home Ins. Co.*, 24 U. C. R. 364.

But the latter objection, since the Act making choses in action assignable at law, is a thing of the past: 35 Vic. ch. 12, O.

Assignees of a policy in a mutual insurance company had, under certain circumstances, the right, even before the late Act, to sue in their own names on the policies. See *Kreutz* v. *Niagara District Mutual Fire Ins. Co.*, 16 C. P. 131, S. C. Ib. 573.

Marine policies of insurance have in England been assignable, so as to enable the assignee to sue thereon in his own name, since 31 & 32 Vic. ch. 86, sec. 1. See *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299; *North of England Pure Oil Cake Co.* v. *The Archangel Maritime Ins. Co.*, L. R. 10 Q. B. 249.

The question which I have now to decide is, whether a person who is interested in the subject-matter of the insurance, to whom the insurance money on the face of the policy is made payable, and to whom the policy is delivered by the insurers, is, in the present state of the

law, entitled to sue thereon in his own name in a Court of law.

It is provided by sec. 2 of 36 Vic. ch. 8, that "Any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiff's right to recover may be an equitable one only."

The demand made here, though unliquidated, is purely for money. The promise of the defendants is, to pay so much money, not exceeding the amount mentioned in the policies, in the event of loss, and the promise is expressly to pay that money to the plaintiffs, to whom the policy was by the defendants delivered. See *Sunderland Marine Ins. Co.* v. *Kearney*, 16 Q. B. 925.

It seems to me that such a demand may be rightly said to be purely a money demand, and the authorities shew that it is such a demand as a Court of equity would enforce at the suit of the plaintiffs against the defendants. See *Livingstone* v. *The Western Ins. Co.*, 14 Grant 461; S. C., 16 Grant 9; *Westmacott* v. *Hanley*, 22 Grant 382.

Besides, as truly said by Morrison, J., in *Campbell* v. *The National Life Ass. Co.*, 34 U. C. R. 40, "The current tendency of legislation is to give to the real parties interested the right of action, and to have before the Courts the litigants really interested in a suit, and to avoid the intervention of nominal plaintiffs."

In that case, which was an action on a life policy, the Court held that the plaintiff, who was one of the children of the deceased, and to whom, by the terms of the policy, money was payable in the event of death, might sue the company for his own share separately without joining the others interested in the policy, and that it was not necessary to institute the action in the name of the executor or administrator of the deceased, or other person having privity of contract.

Policies of insurance should be construed liberally and with a view, if possible, to carry into effect the expressed intention of the parties: *Yeaton* v. *Fry*, 5 Cranch 335; *Palmer* v. *Warren Ins. Co.*, 1 Story C. C. 360; *Henshaw* v. *Mutual Safety Ins. Co.*, 2 Blatch. 99.

Where a policy of insurance contains no words importing interest in any other than the person effecting it, none but himself can obtain the benefit of the policy: *Graves et al.* v. *Boston Marine Ins. Co.*, 2 Cranch. 419. See also *Finney* v. *The Bedford Commercial Ins. Co.*, 8 Metc. 348.

But where it appears on the face of the policy that others are or may be interested, and there is a promise to pay the money to those others, the policy should, if possible, in the present state of the law be enforced, as well in Courts of law as equity. See *Sunderland Marine Ins. Co.* v. *Kearney*, 16 Q. B. 938.

In cases of marine policies the person insured is most frequently named in the policy, but not always, for it may be made by him as agent or trustee, in which case the party interested is named, or if not the agent describes himself to be such, or the policy is declared to be for the benefit of "whom it may concern," or contains some indication of the interest of another person, in which case the person or persons interested, in the event of loss, may sue in their own names on the policy: 1 *Phillips* on Insurance, sec. 28; 1 *Arnould* on Insurance, 220.

A person who assigns away his interest in a ship or goods after effecting a policy of insurance upon them, and before loss, cannot sue upon the policy except as a trustee for the assignee: *Powles et al.* v. *Innes*, 11 M. & W. 10. See also *North of England Pure Oil Cake Co.* v. *The Archangel Maritime Ins. Co.*, L. R. 10 Q. B. 249.

Where the consignee of goods pledges the bill of lading with another person as a security for advances made by him, and upon an agreement that the consignee shall effect an insurance on the goods for the benefit of the pledgee, and deposit the policy with him, the latter, though not named in the policy, may sue on the policy in his own name: *Sutherland* v. *Pratt et al.*, 12 M. & W. 16. See also *Sunderland Marine Ins. Co.* v. *Kearney et al.*, 16 Q. B. 925, 938.

It seems to me that the plaintiffs, who are shewn to have been interested in the subject matter of the loss, and to

whom the defendants, in the event of loss, promised to pay money as an indemnity, had before the Administration of Justice Act the right in a Court of equity to sue in their own names to enforce that promise, and now under the Administration of Justice Act have the same right in a Court of law.

This, I may mention, is now also the rule established in a similar case in several of the United States Courts. See *Barrett* v. *Union Mutual Fire Ins. Co.*, 7 Cush. 175; *Lowell* v. *Middlesex Mutual Fire Ins. Co.*, 8 Cush. 127; *Loring* v. *Manufacturers' Ins. Co.*, 8 Gray 28; *Ripley* v. *The Ætna Ins. Co.*, 29 Barb. 552; *Grosvenor* v. *Atlantic Ins. Co.*, 17 N. Y. 391; *Frink* v. *Hampden Ins. Co.*, 45 Barb. 384; *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454; *Cone* v. *Niagara Fire Ins. Co.*, 60 N. Y. 619; S. C., 3 N. Y.; S. C., 33.

In some of the Courts, the direction in the policy is deemed an assignment of the money by the assured, with the assent of the company, from and after the date of the policy, so as to entitle the person named, with or without interest in the subject-matter of the insurance, to sue on the policy in the event of a loss: *Grosvenor* v. *Atlantic Fire Ins. Co. of Brooklyn*, 5 Duer 517; *Motley* v. *Manufacturers' Ins. Co.*, 29 Maine 337; *Ennis* v. *Harmony Fire Ins. Co.*, 3 Bos. N. Y. 516.

Although there appears to be much good sense to recommend such a conclusion, it is not necessary for me in the present case to go so far in order to sustain the declaration as against the objections taken.

It appears to me in this action that the demand may be properly said to be purely a money demand, and that enough is shewn to entitle the plaintiff to recovery if suing in a Court of equity. This being so, I must give effect to the statute which declares that "no plea, demurrer or other objection on the ground that the plaintiff's proper remedy is in the Court of Chancery, shall be allowed in such action."

Courts now look more to the right than the remedy.

Courts of law and equity are made as far as possible auxiliary to one another for the more speedy, convenient, and inexpensive administration of justice in every case, 36 Vic. ch. 8, sec. 1.

Suitors, when in pursuit of simple justice. are no longer like shuttlecocks to be needlessly tossed from Courts of law to Courts of equity or *vice versâ*. The spirit of modern legislation is as much as possible to enable each Court in the particular case to administer all the justice, called law or equity, which the case demands. Judges should, as far as in their power, consistently with rules of law, act in a similar spirit. Rules which formerly fettered the Judges are being gradually relaxed with a view to the more speedy and effective administration of justice in all Courts.

The plaintiffs are entitled to judgment on the demurrer to each count.

Judgment for plaintiffs.

Re John McLeod and Charles Pemberton and the Corporation of the Town of Kincardine.

Harbour dues—Power of corporation to impose—Imprisonment—36 *Vic. c.* 48, *secs.* 372, 378, *O.*

The corporation of a town has, under 36 Vic. ch. 48, sec. 378, sub-secs. 1, 3, 4, O., no power to impose harbour dues on the shippers or consignees of goods shipped or landed at the harbour, but only on vessels. Clauses of a by-law authorizing such charges, and the seizure and sale of goods therefor, the recovery thereof by action, and the punishment of persons evading them, were therefore quashed.

A provision that any person encumbering, injuring, or fouling any public wharf, should be liable to a penalty named, and in default of payment or sufficient distress, to imprisonment "for not less than ten nor more than thirty days." *Held*, bad, twenty-one days being the limit authorized by sec. 372, sub-sec. 13.

April 21, 1876, *Osler*, obtained a rule, upon reading the affidavits of John McLeod and a certified copy of the by-law of the said town of Kincardine being by-law No. 7, entitled "To impose tolls and wharfage on goods, merchandize, and chattels, exported from or imported to, shipped from or landed at the harbour, or from or on the piers, at the town of Kincardine in the county of Grey," and other papers filed—calling upon the said corporation to shew cause why the first, second, third, and fourth clauses of the said by-law should not be quashed, with costs, on the ground that the clauses objected to are invalid and *ultra vires*, and that the corporation have no power to impose harbour dues, tolls, wharfage, or rates upon merchandize for any purpose whatsoever, and the by-law is as to the said clauses illegal on the face of it; and why so much of the sixth section of the by-law as permits or authorizes imprisonment for a term of thirty days should not be quashed, with costs, on the ground that the corporation had no power to pass a by-law imposing or permitting imprisonment for such a term.

The by-law was passed on the 4th of May, 1875.

The material portions of the by-law, so far as moved against, were as follow:—

1. On and after the 5th day of May, A. D. 1875, the owner or person in charge of, or to whom are consigned or who consigns any goods, or which are shipped on board or landed from any vessel in the said harbour, or from or on the said pier or piers, shall be chargeable with the amount of the toll, wharfage, or rates, as provided in the schedule of rates hereunto annexed, marked "A," for the purpose of keeping said harbour, pier, or piers in good order and paying a harbour master.

2. In case the owner of said goods, or the person in charge of them, or the consignor or consignee neglects to pay the officer in charge of said harbour or the charges for such wharfage, such officer may seize such goods for the harbour duties thereon, and in default of payment within thirty days then the goods may be sold by public auction, and if there be any surplus, such surplus shall be returned to the owner of the goods.

3. In case the owner of any goods refuses, or neglects to pay the charges, such owner may be sued in any Court of competent jurisdiction.

4. Any person attempting to or evading the payment of said tolls or rates shall be liable to a fine of not more than $20, nor less than $1, and costs. And in default of payment of such fine and costs forthwith, then a distress warrant may issue for the collection, and in default defendant shall be imprisoned in the common gaol not less than ten, nor more than thirty days.

6. Any person encumbering, injuring, or fouling any public wharf shall be liable to a penalty of not less than $1 nor more than $20 with costs, and in default of payment, then by distress, and in default of sufficient distress then such offender to be imprisoned in the common gaol for a term not less than ten, nor more than thirty days.

May 5, 1876. *McMichael*, Q. C., shewed cause.
F. Osler, supported the rule.

May 9, 1876. HARRISON, C. J.—The council of every county, city, town, and incorporated village may, under sec. 378 of 36 Vic. ch. 48, O., pass by-laws for the following purposes:

1. "For regulating or preventing the encumbering, injuring, or fouling, by animals, vehicles, vessels, or other means,

of any public wharf, dock, slip, drain, sewer, shore, bay, harbour, river or water:" sub-sec. 1.

2. "For making, opening, preserving, altering, improving, and maintaining public wharves, docks, slips, shores, bays, harbours, rivers, or waters, and the banks thereof:" sub-sec. 3.

4. *a.* For regulating harbours. *b.* For preventing the filling up or encumbering thereof *c.* For erecting and maintaining the necessary beacons. *d.* For erecting and renting wharves, piers, and docks therein, and also floating elevators, derricks, cranes, and other machinery suitable for loading discharging or repairing vessels. *e.* For regulating the vessels, crafts, and rafts arriving in any harbour. *f.* And for imposing and collecting such reasonable harbour dues *thereon* as may serve to keep the harbour in good order, and to pay a harbour master.

This enactment is in effect the same as 29–30 Vic. ch. 51, sec. 296, sub-sec. 1, 2, 3, and 4, passed before Confederation, and which as originally passed only extended to the councils of cities, towns, and incorporated villages.

The latter enactment was afterwards extended to counties by 31 Vic. ch. 30, sec. 43, O.

The council of every county, township, city, town, and incorporated village may under sec. 372 of 36 Vic. ch. 48, pass by-laws:—

For inflicting reasonable fines and penalties not exceeding $50, exclusive of costs, for the breach of any of the by-laws of the corporation: sub-sec. 11.

For collecting such penalties and costs by distress and sale of the goods and chattels of the offender: sub-sec. 12.

For inflicting reasonable punishment by imprisonment, with or without hard labour, either in a lock-up house in some town, or village or in the county gaol or house of correction, for any period not exceeding *twenty-one* days for breach of any of the by-laws of the council, &c.: sub-sec. 13.

The power to regulate the vessels, crafts, and rafts arriving in any harbour is followed by the power to impose and

collect such reasonable harbour dues *thereon, i. e.*, on the vessels, crafts, and rafts as may serve to keep the harbour in good order, and to pay a harbour master.

There is no power to impose the duty on goods, wares, or merchandize contained in the vessels or crafts. See *Re Campbell and the Corporation of the City of Kingston*, 14 C. P. 285, 288.

Section 1, of the by-law moved against, which makes persons to whom goods, wares, merchandize, &c., are consigned chargeable with the amount of toll, wharfage or rates as provided in the schedule A to the by-law, for the purpose of keeping the harbour, pier, or piers in good order, and paying a harbour master, must be quashed.

Section 2, which enables the officer in charge of the harbour to seize, detain, and sell the goods, wares, merchandize, &c., for the harbour dues, must also be quashed.

Section 3, which provides for the bringing of an action in any Court of competent jurisdiction against the owner of the goods, wares, and merchandize, &c., for the amount of the dues must also be quashed.

Section 4, which provides for the punishment of any person attempting to or evading, or any person assisting in the attempt to evade or in the evasion of the payment of the *said* tolls or rates must also be quashed.

So much of section 6 as provides that any person encumbering, injuring, or fouling by animals, vehicles, vessels, or other means any public wharf, dock or pier in the town of Kincardine shall, under the circumstances therein detailed, be imprisoned for a term "of not less than ten, nor more than thirty days," must also be quashed, for the power to imprison in such a case is only for a period "not exceeding twenty-one days:" sub-sec. 13 of sec. 372.

The rule will be absolute with costs.

Rule absolute.

In Re Samuel Richardson and the Board of Commissioners of Police for the City of Toronto.

Tavern and shop licenses—Duty—37 Vic. ch. 32, O.

A by-law passed in February, 1875, under the 37 Vic. ch. 32, enacting that the fees to be paid to the municipality for every certificate for a shop or tavern license under the by-law should be $130: *Held*, valid, without approval of the electors, for under that Act the municipalities could exact up to $130 *for their own use*, without submission to the people.

The by-law was not moved against until March 14, 1876, and the licenses granted under it would expire on the 30th April, 1876: *Held*, that on the ground of delay the Court would have refused to quash.

March 14, 1876. *Davidson Black* obtained a rule, on reading the writ of *certiorari* and return thereto, calling on the Board of Commissioners of Police of the City of Toronto to shew cause why by-law No. 4 of the board, purporting to have been passed on the 23rd February, 1875, should not be quashed, on the grounds—

1. That the by-law illegally prescribed the fee payable for tavern licenses at $160, instead of $130, in violation of sec. 23 of 37 Vic. ch. 32.

2. That the by-law illegally prescribed the fee payable to the municipality of the city of Toronto for a certificate for a license at $130.

3. That the by-law illegally prescribed the fee payable to the municipality of the city of Toronto for the months of March and April of the year 1876, at $21.66, being one-sixth of the amount required to be paid by the by-law to the municipality for a license for a year.

4. That the by-law, though intending a greater sum than $130 to be exacted for a tavern license, was not duly approved by the electors of the municipality in the manner provided by the Municipal Act.

The by-law moved against was passed by the commissioners in the month of February, 1875.

It enacted. in the 10th section thereof, "that the fees to be hereafter paid to the said municipality of the city of

Toronto for certificates for licenses under the by-law shall be as follows:—For every certificate for tavern license, $130; for every certificate for shop license, $130."

It also enacted, in the 9th section, "that all certificates for licenses granted under this by-law shall be for a license for a period of one year, dating from the 1st of March in each year."

The by-law then provided for the issuing of 297 certificates for tavern licenses for the year 1875-6, to persons named, amounting to $57,330; and for 144 certificates for shop licenses, to persons named, amounting to $18,720; in the aggregate amounting to $76,050.

April 11, 1876. *Biggar* shewed cause.

Hodgins, Q. C., with him *Black*, supported the rule.

April 18, 1876. HARRISON, C. J.—It is provided by sec. 24, of the Act of the last session of the Legislature of Ontario, 39 Vic. ch. 26, intituled "An Act to amend the law respecting the sale of fermented and spirituous liquors," which took effect on the 10th of February, 1876, that all licenses theretofore issued and expiring on the 1st day of March then next, should be deemed to continue in effect till the 30th of April, 1876.

This, however, was made subject to the renewal of the licenses for that period, by payment being made to the treasurer of the municipality and to the issuer respectively, of additional duty, equal to one-sixth of the duty, provincial and municipal, payable for the now current year of such licenses.

Thereafter no by-law or certificate of police commissioners in cities or of municipal councils, or other municipalities, for the granting of any license, shall have any force or effect in granting any other or future licenses; and except for the purpose of renewing the said licenses, the powers and duties of all inspectors and issuers appointed under 37 Vic. ch. 32, shall cease.

The year during which licenses are now to be in force

is to begin on the 1st May, and to end on the 30th April, in the year following.

The by-law moved against is therefore nearly spent, and after the 30th April, will be utterly defunct.

No excuse was offered for postponing the motion against the by-law, until so late a period of its existence.

Two questions were raised at the argument:

1. Whether the objection taken is a good one.

2. Whether the Court, in the exercise of discretion, should at this late period quash the by-law.

The privilege of selling spirituous liquors has long been the means of raising a revenue.

At first, in this Province, it was the means of raising an Imperial revenue, afterwards an Imperial and municipal revenue, and now a Provincial and municipal revenue.

The tax which at first was only £1 16s. sterling, has from time to time been expanded to meet the wants of governments and municipalities to such an extent that it may now be $200 without submission to the electors, and much more, if the people desire a larger tax.

A brief retrospect of legislation on the subject will the better enable me to decide the matter in controversy here.

In 1774 the Imperial Legislature passed 14 Geo. III. ch. 88, intituled, "An Act to establish a fund towards further defraying the charges of the administration of justice, and support of the civil government within the Province of Quebec, in America"; the Province of Quebec then embracing the present Province of Ontario, as well as the present Province of Quebec.

It was enacted by the 5th section thereof, "That there shall, from and after the 5th of April, 1775, be raised, levied, collected, and paid unto His Majesty's Receiver General of the said Province, for the use of His Majesty, his heirs and successors, a duty of £1 16s., sterling money of Great Britain, for every license that shall be granted by the Governor, Lieutenant-Governor, or Commander-in-Chief of the said Province, to any person or persons for keeping a house, or any other place of public entertain-

ment, or for the retailing of wine, brandy, rum, or any other spirituous liquors, within the said Province."

In 1831, the Imperial Legislature, by the 1 & 2 Wm. IV. ch. 23, placed the duties imposed by the 14 Geo. III. ch. 88, entirely at the disposal of the Colonial Legislature.

Afterwards the Colonial Legislature passed successive Acts, such as 6 Wm. IV. ch. 4, 3 Vic. ch. 20, and 3 Vic. ch. 21, and other Acts, regulating the sale of spirituous liquors, which were, in 1850, in effect, consolidated and amended by the 13–14 Vic. ch. 65.

The 13–14 Vic. ch. 65, was, in 1853, amended by the 16 Vic. ch. 184, which provided that all sums payable for licenses to keep houses of public entertainment shall be payable to, and shall be collected and received by, such municipal officers as the councils should appoint to issue the same; and that any such license should be taken and held to be a license for the purpose of the Imperial Act, and that the duty imposed by that Act should be payable thereon.

The 16 Vic. ch. 184, also provided that no by-law made under its authority, which should "be intended absolutely to prevent the sale of wine, brandy, or any other spirituous liquor, ale, or beer, within any municipality, at any place other than a house of public entertainment, or shall *require* the payment of a greater sum than £10 per annum for any license to sell the same, * * * shall have force or effect, unless before the final passing thereof it shall have been adopted and approved by a majority of the duly qualified municipal electors of the municipality."

In 1859, an application was made to quash a by-law of the town of Owen Sound, which provided "that every person to whom a new license shall be granted shall pay the sum of £10, over and above the Imperial duty of £2 5s, currency," &c., because it imposed on the persons who were to receive a license a greater sum than £10 per annum, and had not been approved by the electors. The application failed. See *Re Harrison and the Town Council of the Town of Owen Sound*, 16 U. C. R. 166.

Robinson, C. J., in delivering judgment, said, p. 167: "It cannot be said that the *municipal council* by their by-law *requires* more than the £10 to be paid, though they do make a greater sum than £10 payable *in effect*."

Burns, J., said, p. 168: "The limit of £10, to which the town council may go in imposing a duty upon tavern licenses without submitting the by-laws to the municipal electors, appears to me to be a gross sum of that amount, without taking into account the duty of the Imperial Act."

In 1858, provision was made for the imposition of a Provincial duty on tavern-keepers and others selling spirituous liquors by retail: 22 Vic. ch. 76.

It imposed "over and above all other duties," $12 in cities, $10 in towns, and $5 in other municipalities: sec. 14, sub-sec. 1.

It also enabled the municipal officers to receive the Provincial together with other duties for the license, and obliged them to account and pay over the Provincial duty to the receiver general, deducting four per cent. for trouble of collection: sec. 14, sub-sec. 2.

In 1859, it was for the first time decided that the license from the municipal authorities was sufficient, without any license from the Lieutenant-Governor to authorize the sale of spirituous liquors. *Andrew* v. *White*, 18 U. C. R. 170.

In 1859, it was by Consol. Stat. U. C. ch. 54, sec. 247, provided that the sum to be paid for a tavern license shall include as well the duty payable under the Imperial statute 14 Geo. III. as the duty payable to the Province under any Act of Parliament of the Province, and shall not be less than $25; and that every license so granted shall be held a license for the purpose of the Imperial and Provincial Acts; and that except the sum payable to the Province the sum paid for the license shall be paid to the use of the municipal corporation.

It was by the latter enactment also provided, almost in the words of 16 Vic. ch. 184, that no by-law by which a greater sum than $100 per annum is *intended* to be *exacted*

for any shop or tavern license, * * shall have any force or effect unless before the final passing thereof duly approved by the electors.

In 1869, it was by the 32 Vic. ch. 32, sec. 3, O., declared that, "Over and above the sum which may be imposed by municipalities, * * there shall be paid for each tavern license to and for the use of Her Majesty, * * in cities, a duty of... $20
In towns, of 17
In townships and incorporated villages, of 10
And for each shop license, of ..... 12"

It was by the same Act (sec. 10) declared that the sum to be paid for a tavern or shop license, in addition to the Provincial duty, should be such a sum as should be fixed by by-law, and *including* the Provincial duty, should
In cities be not less than..... $80
In towns, not less than 60
In townships and incorporated villages, not less than... 30
And in all places for a shop license, not less than 50

Sec. 10 also enacted that no by-law by which a greater sum than $130 per annum, is *intended* to be *exacted* for any tavern or shop license, shall have any force or effect, unless approved by the municipal electors.

In 1874, it was by the 37 Vic. ch. 32, sec. 9, (the act in force when the by-law moved against was passed,) enacted that in the respective municipalities in which the sale of intoxicating liquors, and the issue of licenses therefor, is not prohibited under the provisions of the Temperance Act of 1864, it shall be the duty of the council of the township, town, and incorporated village, and of the commissioners of police in cities to pass by-laws in the month of February in each and every year, and which shall not be altered or repealed during the year, from the 1st day of March following. And by sub-sec. 7, "For determining the sums *to be paid to the municipality* in respect of tavern and shop licenses respectively.

It was, by sec. 22 of the same Act, declared that "over and above the sum which may be imposed by municipalities," as by law provided, there shall be paid for each tavern license for the use of Her Majesty:

In cities, a duty of $30
In towns, a duty of..... 25
In townships and incorporated villages, a duty of 15
And for each shop license by retail in cities, a duty of... 30
In towns, a duty of 25
In township and incorporated villages, a duty of 15
And for each license, by wholesale..... 50

It was by sec. 23 of the same Act, provided that the sum to be paid for a tavern or shop license in *addition* to the Provincial duty, shall be such sum as shall be fixed by by-law of the municipality, and *including* the Provincial duty, shall be:

In cities, not less than $80, for taverns and shops.
In towns, " " 60, " " "

In townships and incorporated villages, not less than $30, for tavern and shops.

It was also provided by section, 23 that "no by-law by which a greater sum than $130 per annum," is, (in the language of previous Acts,) *intended* to be *exacted* for any tavern or shop license, shall have any force or effect unless the by-law, before the final passing thereof, shall have been duly approved by the electors.

It was also provided by sec. 16 of the same Act that every license issued under the Act should be a license for the purpose of the Provincial duty, as well as for the sum payable to the municipality therefor; and that the sum paid for the license, "over and above the Provincial duty," should be applied to the use of the municipality.

The Act also provided for the issue of the licenses by an officer appointed by the Lieutenant-Governor in council, and for the issue by the clerk of the municipality, or commissioners of police in cities, of certificates to persons authorizing them to receive licenses from the proper officers in that behalf: sec. 14.

The persons to whom these certificates were issued were, on presentation thereof to the issuer of licenses, and on payment to him of the Provincial duty thereon, entitled to licenses: *Ib.*

The licenses were invalid until the applicant should have paid to the treasurer of the municipality the sum made payable therefor to the municipality, and have obtained a receipt for such payment, signed by the treasurer and endorsed on the license: *Ib.*

It is now provided by sec. 16 of the Act of last session, ch. 26, that the following duties shall hereafter be payable, and shall be in lieu of all others, Provincial or municipal:—

For each	wholesale license	$150
"	shop license, in cities	100
"	" in towns	80
"	" in other municipalities	60
"	tavern license, in cities	100
"	" in towns	80
"	" in other municipalities	60

Power is, by the same section, given to the council of any municipality by by-law to require a larger duty to be paid for tavern and shop licenses therein, but not in excess of $200 "*in the whole*," unless the by-law be approved by the electors.

The by-law moved against provides "that the fees to be hereafter paid *to the said municipality* of the city of Toronto for certificates for licenses * * * shall be as follows:—

For every	certificate for tavern license	$130
"	" shop license	130

The question is, whether this can be said, under sec. 23 of 37 Vic. ch. 32, to be a by-law "by which a greater sum than $130 per annum was *intended* to be *exacted* for any tavern or shop license."

The determination of this question must depend on the construction to be given to the words "*intended* to be *exacted*." If these words mean intended to be exacted *by the municipality*, the by-law moved against is good without submission to the electors. If they mean intended *in the whole* to be exacted by the municipality and the Government, the by-law is bad without submission to the electors.

In other words, if the enactment is to be read as authorizing municipalities, for their own use, by by-law to exact up to $130 without submission to the people, the by-law is good. But if it is to be read as requiring submission to the people of every by-law which, taken in connection with the Provincial duty, in the whole, has the effect of exacting more than $130 for a license, the by-law is bad.

The Act of last session, by the use of the words "in the whole," has, as I recently determined in *Re Brodie and Bowmanville*, ante p. 580, removed any doubt on the point as to the meaning of such by-laws as are passed under or pursuant to that Act.

Now, excluding the Act of last session from view in the interpretation of the present by-law, it seems to me that *Re Harrison and the Town Council of the Town of Owen Sound*, 16 U. C. R. 166, is an authority for holding under sec. 23 of 37 Vic. ch. 32, that a by-law exacting for the use of the municipality $130 for a shop or tavern license, over and above the amount payable to the Government, is valid.

The word "required," as used in the 16 Vic. ch. 184, is of the same signification as the word "exacted," as used in the 37 Vic. ch. 32. Both enactments are silent as to the persons who are to require or exact the maximum amount authorized without submission of the by-law to the electors. The Court, under 16 Vic. ch. 184, held, that what was intended was to regulate only the amount payable to the municipality for its own use. This is all that the municipal council can in any case have power to regulate. This is the express power conferred on municipal councils and police commissioners by sub-sec. 7 of sec. 9 of 37 Vic. ch. 32. So long as the sum is not made by the municipality to exceed $130, submission of the by-law to the people would therefore appear to be unnecessary.

In no Act prior to the Act of last session were the words "in the whole," used in connection with such by-laws. By the use of these words the rule of interpretation applicable to such by-laws is changed. The by-law having

been passed before the Act of last session, ought to be held subject to the rule of interpretation enunciated in *Re Harrison and the Town Council of the Town of Owen Sound*, 16 U. C. R. 166.

There is not only the language, (sub-sec. 7 of sec. 9,) "For determining the sums to be paid *to the municipality* in respect of tavern and shop licenses respectively;" but the language at the commencement of sec. 23, that "The sum to be paid for a tavern and shop license in *addition* to the Provincial duty mentioned in the last preceding section, shall be such a sum as shall be *fixed* by by-law of the municipality passed by the proper authority in that behalf, "to shew that the by-law is, as regards its maximum amount, to deal *only* with the amount payable to the municipality.

Viewing the proviso to sec. 23, by the light furnished by the preceding expressions, I must read it as if the language were, "but no by-law by which a greater sum than $130 per annum is intended to be exacted *by the municipality*, for any tavern or shop license, * * shall have any force or effect unless," &c.

The doubt as to the proper interpretation of the proviso arises from the use of the words, "including the Provincial duty," used in the body of the section, in reference to the minimum of duty and the omission to use any such words in reference to the maximum of duty. It appears to me that the proviso as to maximum of duty, ought not to be controlled by these words. Reading the proviso without such control, it can have no other meaning than the meaning put on similar words in *Re Harrison and the Town Council of the Town of Owen Sound*, 16 U. C. R. 166.

This leads me to the conclusion, although not entirely free from doubt, that the objection taken to the by-law in question is not well taken.

I may add that even if I had, on an examination of the statutes and authorities, arrived at a different conclusion, I would not have exercised the discretion which the Court has to refuse to quash by-laws after long and unexplained delay; and where the effect of quashing a by-law after

such delay, may be to cause great inconvenience and confusion in the affairs of a municipality, and especially where, as here, the by-law is almost spent in its operation.

In *Re Sheley and the Corporation of the Town of Windsor*, 23 U. C. R. 569, the Court, because of the long delay in moving, refused a rule *nisi* to quash a by-law passed 18 months before, for licensing and regulating houses of public entertainment—the objection being, as here, that it had not been before its final passing, submitted to the electors for approval.

Reference may also be made on the same ground to the following cases: *Hodgson* v. *Municipal Council of York and Peel*, 13 U. C. R. 268; *Hill* v. *Municipality of Tecumseth*, 6 C. P. 297; *Bogart* v. *Town Council of Belleville*, Ib. 425; *Standley and The Municipality of Vespra and Sunnidale*, 17 U. C. R. 69; *Ianson and The Corporation of the Township of Reach*, 19 U. C. R. 591; *Cotter* v. *Municipality of Darlington*, 11 C. P. 265; *Re Michie and The Corporation of the City of Toronto*, Ib. 379; *Re Grant and The City of Toronto*, 12 C. P. 357; *Re Scarlett* v. *The Corporation of York*, 14 C. P. 161; *Re Drope and Corporation of the City of Hamilton*, 25 U. C. R. 363; *Re Leddingham and The Corporation of the Township of Bentinck*, 29 U. C. R. 206; *Re Taylor and The Corporation of the township of West Williams*, 30 U. C. R. 337; *Re Platt and The Corporation of the City of Toronto*, 33 U. C. R. 53 *Re McKinnon and The Corporation of the Village of Caledonia*, Ib. 502.

The rule must be discharged with costs.

Rule discharged.

Diamond v. Coleman.

Diverting water—Riparian rights—Estoppel.

To a declaration for diverting water from the plaintiff's mill and premises and using it to work defendant's sash factory, defendant pleaded, on equitable grounds, that while one R. F. C. owned the mill, defendant's father, T. C., owned certain lands higher up the river, and erected a saw mill, which was afterwards changed into a sash factory, and opened a sluice-way in the dam, and cut the bank of the canal to said saw mill and factory, and used enough of the water to work the same, which are the grievances now complained of: that all this was done with the knowledge and consent of said R. F. C., through whom plaintiff claims; and defendant acquired the saw mill, &c., as they were used by T. C., and the alleged grievances are a user by defendant as they were so used by R. F. C.

The plaintiff replied by way of estoppel a judgment recovered by one D., through whom the plaintiff claimed title, in an action against R. & T., then the defendant's tenants in occupation of the sash and blind factory, in which D. sued for a similar diversion of water to that sued for in this action. The replication, after setting out the pleadings in that action, and the judgment recovered, for $50 damages, alleged that it was defended by R. & T. at the instigation and for the benefit of the now defendant, as their landlord, who employed the attorney and counsel, and paid the costs, and was the actual defendant, R. & T. being only the nominal defendants; and that the issues therein disposed of were substantially the same as those raised here, and the wrongs now complained of are a continuation of the wrongs for which D. then recovered judgment.

Held, bad, for such judgment could form no estoppel, the defendant not being a party to the record in that action, nor capable of being substituted as such for his tenants, as in ejectment.

Demurrer. Declaration on the case, for diverting water flowing from the river Moira through a canal from the plaintiff's mill and premises, by opening a sluiceway in the dam of plaintiff's mill and cutting the bank of the canal and using said water to work defendant's sash and blind factory, situated higher up on the canal than the plaintiff's mill and built long afterwards.

Pleas. 1. Not guilty. 2. Leave and license. 13. A plea by way of defence upon equitable grounds.: that before the committing of the alleged grievances, &c., and while one R. F. Coleman owned and occupied said grist mill and premises, the defendant's father, one T. Coleman, was possessed of certain lands, water privileges, and easements higher up on the river Moira than the plaintiff's mill, and had occasion to, and did erect a certain saw mill, which was afterwards changed into the said sash and blind factory

and opened a sluice-way in said dam, and cut the bank of said canal at or near the head thereof, to said saw mill, and used sufficient of the water of said river to propel the machinery, first, of said saw mill, and afterwards of said sash and blind factory, and did expend large sums of money in so erecting said saw mill and opening said sluice-way and cutting the bank of said river as aforesaid, and the grievances in the declaration were and are occasioned by the erecting of said sluice-way and cutting the bank of said canal as aforesaid, and continuing the same, and using sufficient of the water of said river for propelling said saw mill and afterwards said sash and blind factory as to the same appertained; and the said R. F. C. during all the times aforesaid, always had notice of the premises hereinbefore in this plea mentioned, and the said T. C. so erected said saw mill and opened said sluice-way, and cut the bank of said river, and expended the said sums of money in so erecting said saw mill and opening said sluice-way and cutting the bank of said river as aforesaid, with the knowledge, acquiescence, and consent of the said R. F. C. in that behalf, and on the faith that the said R. F. C., through whom the plaintiffs claim, so knew of, acquiesced in, and consented to the said T. C. so erecting said saw mill and opening said sluice-way, and cutting the bank of said river and using said water necessary to propel the machinery of said saw mill, and expending the said sums of money in that behalf as aforesaid, respectively; and the defendant purchased and acquired the said saw mill and water privileges, and the lands and premises used and connected therewith in the same state and condition as they were used and enjoyed by the said T. C.; and the alleged grievances in the declaration mentioned are a user by the defendant of said water privilege and saw mill (changed into a sash and blind factory) as the same were used and enjoyed by the said T. C., with the knowledge, acquiescence, and consent of the said R. F. C., as aforesaid, through whom the plaintiffs claim title.

Replication to all the pleas, except the first and twelfth,

by way of estoppel, a judgment recovered by one John Wesley Diamond, through whom the plaintiff claims title to the mill and premises in the declaration mentioned, in an action brought against James N. Reddick and Hercules A. Thompson, then tenants of the defendant in the occupation of certain premises mentioned in the pleadings as a sash and blind factory, in which action the said John Wesley Diamond claimed damages against the said Reddick and Thompson for a like diversion of water as the plaintiff claims damages for in this action. The replication, after setting forth at large the pleadings and judgment recovered in the former action with $50 damages, alleged that the former action was defended by Reddick and Thompson at the instigation of and for the benefit and interest of the now defendant as their landlord, who, as the replication alleged, employed the attorney and counsel and paid the costs on the part of the defence, and was then the actual defendant leaving the said Reddick and Thompson, as the fact was, only the nominal defendants therein. And the replication in substance further alleged that it appeared by the record of said judgment so set out on the replication that the issues therein disposed of were substantially the same as are attempted to be raised by the the defendant's pleas in this action replied to by way of estoppel to the said replication, and that the wrongs complained of in the present action are a continuation of the wrongs for which the said John Wesley Diamond recovered judgment in the former action.

The defendant demurs to this replication, and also rejoins several matters by way of several rejoinders; the plaintiff demurs to four of these rejoinders besides taking issue in fact upon them, and files exceptions to the 13th or equitable plea.

The exceptions were as follows:

1. Said plea is no answer either in law or equity to the declaration.

2. Under the fourth count of the declaration the plaintiff, by grant from T. F. Coleman claims to be entitled to

one equal moiety of the water flowing through the canal, and admits that the defendant is entitled to use the other moiety of such water, and the said plea does not deny that the defendant used more than the share of water to which he was thus entitled.

3. For ought that appears in said plea the said T. F. Coleman did not use more than one-half of the water, and therefore no more than he was entitled to use, as admitted in said fourth count, while the defendant in said fourth count is charged with having used a greater quantity of water than he was entitled to use, or more than one-half.

4. Said plea attempts to set up as a bar to the plaintiff's recovery a prescriptive user for a period less than twenty years.

5. Said plea does not state that the defendant, and those through whom he claims title, had an uninterrupted enjoyment as of right for twenty years before the commencement of this suit to use the water as in said plea mentioned.

6. The said plea does not shew a continuous user of said water, and for all that appears the user may have been abandoned long enough to destroy the defendant's alleged right.

7. Said plea does not allege that the plaintiff had notice of the acquiescence of the said R. F. Coleman in the user of said water, in manner set forth in the said plea, and without such notice the plaintiff as an innocent purchaser for value would be protected by the Registry laws of the Province of Ontario.

8. Said plea does not allege from whom defendant purchased, or through whom he acquired title to said sash and blind factory, or that he ever acquired any title to the easement claimed in said plea.

9. Said plea alleges that defendant took only sufficient water to run and work said sash and blind factory, but for all that appears it might have taken all the water for such purpose, and thereby entirely deprived the plaintiff of the use of the same for the working of his said grist mill.

10. For all that appears T. C. may have used and diverted only such water as he was entitled to after-

his grant to R. F. C., while the defendant and his tenants may of their own wrong have far exceeded such user and thereby made defendant liable for damages in this action.

February 4, 1876. *Bethune*, with him *Clute*, for defendant. On the question of estoppel see *Doe* v. *Earl Derby*, 1 A. & E. 783, 2 Sm. L. C., ed. 1876, 770, 793, where the cases are collected. *Bigelow* on Estoppel 147, 148; *Davis* v. *Marshall*, 10 C. B. N. S. 697. In actions of trespass for mesne profits the landlord is bound, but that is peculiar to such actions: *Doe* v. *Clute*, 17 Q. B. 167; *Wilkinson* v. *Kirby*, 15 C. B. 430; *Herr* v. *Weston*, 32 U. C. R. 402. An estoppel must be mutual, and here there could have been none that we could plead, The parties should be the same, the contract the same, and this should appear to be the case by record in the pleadings. If it do work an estoppel, we ask to amend the judgment in the former case. The equitable plea is warranted by *Dean* v. *Grey*, 22 C. P. 202.

Diamond, contra. The general rule as to estoppel is, that any thing once tried is not to be tried again: *Herr* v. *Weston*, 3 U. C. R. 402; *Chambers* v. *Dollar*, 29 U. C. R. 589; *Taylor* v. *Hortop*, 33 U. C. R. 462; *Linster* v. *Stapler* 17 C. P. 532; *Dean* v. *Grey*, 22 C. P. 202, are illustrations of the application of estoppel. The equitable plea is not sufficiently set out. It does not state where the mill was erected: nor how much money was expended, nor any privity with T. F. Coleman. He also referred to *Outram* v. *Moorewood*, 3 East 346.

March 17, 1876. GWYNNE, J.—The replication by way of estoppel is clearly bad, as it professes to be pleaded to the 13th or equitable plea as well as to all the others besides the 1st and 12th, and a reference to the record of the judgment recovered in the former action shews that no such defence was set up in the former action. The replication, then, upon the face of it shewing that by reason of the judgment recovered in the former suit, it claims that a defence not set up in the former action. and

consequently not adjudicated upon therein, should be excluded from consideration in the present action must be held to be bad upon demurrer. But I am of opinion that if the replication by way of estoppel had been in terms confined to all the pleas except the 12th and 13th it would still have been bad.

The plaintiff's counsel supported the replication, likening this to the case of *Herr* v. *Weston*, 32 U. C. R. 402, wherein it was held in an action for mesne profits, wherein the defendants pleaded title to the lands in respect of which the action was brought, a replication by way of estoppel of recovery in ejectment at the suit of the plaintiff against one Gardner then in possession as tenant under the defendants which said Gardner, as the replication alleged, upon being served with process in the ejectment, immediately, and before entering appearance, notified the defendants of the service of the writ upon him, and of the plaintiff's title to the land, and that the plaintiffs were present at the trial of the ejectment and assisted Gardner in his defence. Upon demurrer this replication was held to be good by way of estoppel.

As far as I have been able to find, this is the only express authority upon the point there decided.

It is laid down, it is true, in *Cole* on Ejectment, at p. 640, referring to the action for *mesne* profits, "If the defendant who so pleads," (that is title in himself, or that the plaintiff was not possessed), "was not a defendant in the action of ejectment, the replication by way of estoppel should shew * * that he was the landlord of one of the tenants in possession, and had due notice of the ejectment pursuant to 15 & 16 Vic. ch. 76, sec. 209, and an opportunity of defending the action if he thought fit," citing *Hunter* v. *Britts*, 3 Camp. 455, and *Matthew* v. *Osborne*, 13 C. B. 919, as the authority for this position.

Now, *Hunter* v. *Britts*, 3 Camp. 455, being a nisi prius decision, really decided not that such a replication would be a good replication by way of estoppel, but that in an action for mesne profits against the landlord, who was proved to

have been in receipt of the rents and profits from the time of the demise laid in the ejectment until the writ of possession was executed, but who had no notice of the action of ejectment until after the judgment, the judgment against the casual ejector was not any evidence of title at all against the defendant who had no notice of the ejectment.

And in *Matthew* v. *Osborne*, 13 C. B. 919, which was also an action for mesne profits against a landlord who was not a defendant in the ejectment, all that was held was, that where there was a plea of not possessed upon the record, the judgment in ejectment could not be given in evidence as conclusive without a replication by way of estoppel. This proceeded upon the principle that where a party has an opportunity of pleading by way of estoppel, and does not do so, the matter is open. In that case it appeared that the defendant had notice of the proceedings in the ejectment, but he did not come in and defend as landlord.

Jervis, C. J., as to his having had notice says, at p. 939, "It is unnecessary, however, to consider the effect of that, which might have given him the right to defend as landlord."

And Williams, J., says, at p. 944, "As to whether the recovery in ejectment operated as an estoppel, * * it is unnecessary to decide whether there was such a privity between these parties as to make the record admissible."

In *Doe* v. *Wright*, 10 A. & E. 763, and *Wilkinson* v. *Kirby*, 15 C. B. 430, cases in which it has been decided that replications by way of estoppel setting up the recovery in ejectment in answer to a plea setting up title in an action for mesne profits, are good replications in bar of such pleas, the defendants to the action for mesne profits were the defendants upon the record in the ejectments.

In *Cole*, in the appendix, at p. 834, form 398, the form of replication is given where the action for mesne profits is against the landlord who was not a defendant in the record in ejectment, in which are contained the allegations following, as deemed to be necessary in order to make the replication good, after setting out the judgment in ejectment

against C. D., "and the said C. D. forthwith, after being served with the said writ in ejectment as aforesaid, gave notice thereof to the now defendant, according to the form of the statute in such case made and provided: *And the now defendant could and* might, if he had thought fit, have applied to the said Court, * * according to the form of the statute in such case made and provided, for leave to appear and defend the said action of ejectment as landlord of the said C. D. for the said tenements, with the appurtenances, so in the possession and occupation of the said C. D. as tenant thereof to the now defendant as aforesaid; *but the defendant wholly neglected and omitted so to do.*"

Assuming, then, to a plea of title pleaded by a landlord in an action for mesne profits and costs in ejectment brought against him, the plaintiff may reply the recovery in ejectment against his tenant by way of estoppel, when the tenant, on being served has given his landlord notice under the statute, so as to enable him to procure himself to be made defendant in lieu of the tenant, the reason appears clearly to be because of the provision of the statute enabling the landlord, to have himself made defendant, and to defend his title in lieu of his tenant, so that in the event of an adverse verdict he could move the Court to nonsuit the plaintiff or set aside the verdict, or if need be, could bring error. Being the person most interested in the title, which alone is in dispute, and being able to have himself made defendant, instead of his tenant, having notice of the action, he may well be held to be the party really defending, and is a party to the record, although he neglect to have himself made a party in fact; but where an action upon the case, like the present, is brought against a tenant for a wrong done to the plaintiff, there is no provision of law requiring the tenant to notify his landlord of such action, or enabling the landlord to be made defendant on the record in lieu of the tenant, nor is there any reason, as there is in ejectment, requiring him so to do, any more than for any other person to come in and defend.

The landlord in such a case is as much a stranger to the record as any other person, and his suggesting the defence

to be set up by the tenant, or even his paying the tenant's expenses, cannot make him a party to the record; neither can the landlord, under whom the tenant claims, be held to claim through his tenant so as to make him privy in estate with his own tenant. Being neither a party to the record or capable of being substituted as such for the tenant, or liable in any way to the plaintiff for costs, or in a position to have any error in the action against the tenant rectified, to bring error for any matter constituting error, he cannot, in a subsequent action brought against himself for a like tort, be estopped by judgment against his tenant from setting up any defence he may be advised to the action against himself.

If he could be so, could any purchaser from him at any future time be estopped by the judgment against the now defendant's former tenants, so that a privity could be established between the purchasers in fee simple from the now defendant and his former tenant for years, a privity which is not recognized in law? It may be that the recovery in the former action against the now defendant's tenant may prevent the defendant having benefit from some of the pleas, but it is not by reason of estoppel.

For example, the defendant now pleads an uninterrupted prescriptive title for 20 years next preceding action brought. Upon this issue, the defendant, no doubt, will be affected by the interruption alleged, which was caused by the former action brought against *his* tenants, for an interruption of *their* exercising a right would be an interruption of the now defendant. Upon the whole, I do not think that either upon principle or upon the authority of any decided case the defendant can, in this action, be *estopped* from entering into his defence.

The area of the application of the doctrine is not, I think, to be enlarged to this extent. I must therefore hold the replication to be bad for the reasons I have assigned.

As to the demurrers to the rejoinders, no doubt some of the rejoinders appear to be as bad as they can well be made by modern skill in the art of pleading, which appears to

me in practice to consist in the endeavour to avoid coming to a single, certain, and material issue, and to defer as long as possible arriving at any issue; but as I am of opinion that the replication to which they are pleaded is bad, with which they also must all fall, it is unnecessary to refer to them further.

As to the exceptions to the 13th plea, which is pleaded upon equitable grounds, I think I may appropriately apply some of the language of Lord Chancellor Cottenham, in *Williams* v. *Earl Jersey*, 1 Cr. & Ph. 91, 97, to this plea: "It is impossible, * * to say that a party may not so encourage that which he afterwards complains of as a nuisance as not only to preclude him from complaining of it in this Court, but to give to the adverse party a right to the interposition of this Court, in the event of his complaining of the nuisance at law."

If I should disallow the plea I should in effect be deciding that under the allegations contained in it, it would be impossible for the defendant to give any evidence which, would entitle him to the interposition of the equitable powers of the Court. See *Davies* v. *Marshall*, 10 C. B. N S. 697.

No doubt the allegations here are very different from these in the equitable plea in *Dean* v. *Gray*, 22 C. P. 202, but I am not prepared to say that the general averment of the acquiescence and consent of the party (through whom the plaintiff now claims) to the doing of that of which the plaintiff now complains, is so utterly defective as to be incapable of being sustained by any evidence, however strong, of encouragement, acquiesence, or consent, upon the faith of which the acts complained of were done which would give rise to the equity which the defendant invokes.

Whether the verdict relied upon by the defendant will prove sufficient for his purpose is a question, and, as I apprehend, the substantial question, which will arise upon the evidence. I think I must leave the point to be determined by the tribunal which shall take the evidence. I

cannot venture to say that the plea is so bad as to be incapable of being supported by any evidence.

Judgment, therefore, will be for the defendant upon the demurrer to the replication which has been demurred to, and upon the exceptions to the 13th plea.

Judgment accordingly.

William Patterson v. James Scott.

Action for arrest of plaintiff and dismissal from defendant's service—Justification under suspicion of felony—Pleading.

Declaration in trespass, for assaulting the plaintiff and giving him into custody. Plea, that the plaintiff was defendant's clerk, and as such was in the habit of receiving money for the defendant: that a large sum of defendant's money which had come into plaintiff's hands was feloniously stolen by some person; that the plaintiff, though requested by defendant, would not account for the same; whereupon the defendant having good and probable cause of suspicion and suspecting the plaintiff to have been guilty of the felony gave him in charge to a constable to take him before a magistrate. *Held*, no defence, for that no reasonable or probable cause was shewn either as regarded the action of defendant or of the constable.

The second count was for wrongful dismissal of the plaintiff, who had been hired by defendant as a merchant's clerk for a year. Plea, that defendant had large sums of money stolen from him by some persons; that the plaintiff being then in defendant's employment, and having as such clerk had said money in his possession, did not, nor would account for the same, whereby defendant had reason to, and did suspect that the plaintiff had feloniously embezzled the money, and by reason thereof defendant dismissed him. *Held*, bad, for no facts were stated to justify defendant's alleged suspicion.

Demurrer. Declaration—first count: for assaulting and beating the plaintiff, and giving him into the custody of a constable.

Second count: for breach of a contract to hire the plaintiff in the capacity of a merchant's clerk for a year from the 17th of August, 1875, at the wages of $500 per annum, alleging a wrongful dismissal before the expiration of the year.

Pleas. To the first count: that before the commission of the alleged trespass the plaintiff was a clerk to the defen-

dant, and by virtue of such his employment was in the habit of receiving and taking into his possession divers sums of money for and in the name of and on account of the defendant: that while the plaintiff was such clerk a large sum of money of the defendant which had come into the hands of the plaintiff was feloniously stolen by some person or persons: that the plaintiff was requested by the defendant to account for the same, and the plaintiff did not nor would account for the same, whereupon the defendant having good and probable cause of suspicion, and suspecting the plaintiff to have been guilty of the felony, did give the plaintiff in charge to a constable named, and then requested the constable to take the plaintiff into custody, and carry him before a justice of the peace, which the constable did; *quæ sunt eadem.*

2. To the second count: that while the plaintiff was in the service and employment of the defendant as such clerk as aforesaid the defendant had large sums of money feloniously embezzled and stolen from him by some person or persons: that the plaintiff being then in such service and employment of the defendant as his clerk, and having had the said money in his possession by virtue of his employment as such clerk, did not nor would account for the same whereby the defendant had reason to suspect and did suspect that the plaintiff had feloniously embezzled the money, and by reason thereof the defendant dismissed the plaintiff from his service.

The plaintiff demurred to these pleas: to the first on the grounds

1. That the plea shows no justification.

2. That the fact that the defendant had reasonable grounds for suspecting and believing that a felony had been committed did not justify the defendant taking the law into his own hands, and arresting the plaintiff.

3. That the plea does not shew even a suspicion of felony on the part of the plaintiff.

The grounds of demurrer to the second plea were:

1. That no suspicion that the plaintiff had been guilty of embezzlement would justify a breach of the contract.

2. That the plea does not shew even a suspicion of felony.

April 4, 1876. *Fleming* (of Brampton), for the demurrer. As to the first plea no suspicion is alleged, and as to the second plea no suspicion will afford a justification. The pleas are bad.

Beynon, contra, cited *Davis* v. *Russell*, 5 Bing 352; *Turner* v. *Ambler*, 10 Q. B. 252; *Haddrick* v. *Heslop*, 12 Q. B. 267.

April 7, 1876, HARRISON, C. J.—The defendant is charged with trespass and with breach of contract.

He has attempted to justify both charges. I do not think he has justified either charge.

As to the first, the arrest:

If a private person, suspecting a felony to have been committed, state facts to a constable, and the latter on his own responsibility makes an arrest without a warrant, no action will lie for the arrest against the private person: *Barber* v. *Rollinson*, 1 C. & M. 330; *Carratt* v. *Morley*, 1 Q. B. 18; *Brandt* v. *Craddock*, 27 L. J. Ex. 314; *Grinham* v. *Willey*, 4 H. & N., 496; *Smith* v. *Evans*, 13 C. P. 60.

But if the private person do more than simply put the law in motion: if he direct or command the arrest, he may be sued in trespass: *Stonehouse* v. *Elliott*, 6 T. R. 315; *Campbell* v. *McDonell et al*, 27 U. C. R. 343; *Stephens* v. *Stephens*, 24 C. P. 424.

The plea here admits the trespass, for it alleges that the defendant requested the constable to take the plaintiff into custody.

There is a distinction between a private individual and a constable in the case of an arrest for suspicion of felony. In order to justify a private person in causing the arrest of another he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed by somebody. Whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to

detain the party suspected until enquiry can be made by the proper authorities. See per Tenterden, C. J., in *Beckwith* v. *Philby*, 6 B. & C. 635, 638.

It is alleged in this plea that a felony had been by somebody committed, so that if the facts disclosed shew reasonable and probable cause for suspecting the plaintiff, the defendant and the constable would be both justified in making the arrest.

The question of reasonable and probable cause is, when the facts are undisputed, a question of law: *Lister* v. *Perryman*, L. R. 4 H. L. 521; *Riddell* v. *Brown*, 24 U. C. R. 90; *Joint* v. *Thompson*, 26 U. C.R. 519.

I entertain no doubt in this case, having examined the authorities, that the facts shewn do not disclose reasonable and probable cause either as regards the action of the defendant: *Mure* v. *Kaye*, 4 Taunt 34: *Darling* v. *Cooper*, 11 Cox 533; or of the constable: *Davis* v. *Russell*, 5 Bing, 354; *Hogg* v. *Ward*, 3 H. & W. 417. If there were no facts to justify the conduct of the defendant beyond those asserted in the plea, I am clear that there was an entire absence of reasonable and probable cause. Little more if anything, than suspicion is stated in the plea. That is not enough. There must be reasonable grounds for the suspicion. I see none such, in this case.

The first plea demurred to is, therefore, in my opinion bad.

As to the second plea demurred to, the one which attempts to justify the dismissal of the plaintiff, I am of opinion that it is also bad.

No one disputes the right of a master to dismiss his clerk for misconduct during the currency of and in the course of employment; but I do not see in this plea any allegation whatever of misconduct. The only breach of duty alleged is that the plaintiff did not nor would account for money of the defendant which had been feloniously embezzled by some person or persons unknown.

The loss was something that the defendant felt at the time, and had a good right to feel. Smarting under

the loss he became, in all probability, suspicious of the plaintiff's honesty, but without alleging that the plaintiff is the thief, and without alleging any facts which would justify a reasonable man in entertaining such a suspicion dismissed the plaintiff.

If the plaintiff had so dealt with the money as to make it probable that he was the thief—if he had told falsehoods about it, or in any other manner acted like a guilty man—there might be some reason in the conduct of the defendant; but without any allegation of any such facts or any other facts of suspicion, it would be too much to permit the defendant merely because suspicious to deprive the plaintiff of his situation and of his character.

The law, in some cases, has regard to infirmity of temper and weakness of disposition, but in no case has it ever justified a master in dismissing clerks or servants hired by the year merely because suspicious of their honesty, without facts of some kind on which reasonably to found suspicion.

The plea is bad. Both pleas are bad.

Judgment for plaintiff on demurrer.

Re Jamieson and the Corporation of the County of Lanark.

Obligation on county to repair bridge—Mandamus—Indictment.

Where a county council is liable to repair a bridge the proper remedy is indictment, not mandamus.

December 4, 1875. *J. K. Kerr* obtained from Wilson, J., sitting alone, a rule *nisi* for a writ of *mandamus* to compel the defendants to repair a bridge over the Mississipi in the village of Almonte, in the said county.

The affidavits filed on obtaining the rule and those in reply were numerous, and very conflicting as to the necessity for the bridge and the probable travel upon it.

March 7, 1876. *Osler*, shewed cause before Harrison, C. J., and contended that if the county were liable at all the proper remedy was indictment and not mandamus. He cited *Harrison's* Mun. Man., 3rd ed., secs. 409, 410, 411, 412, 419, 440, sub-secs. 2, 5 and notes; *Angell & Ames* on Corporations, 10th ed., pp. 711, 712, 717; *Regina* v. *Trustees of the Oxford and Witney Turnpike Roads*, 12 A. & E. 427; *Regina* v. *Municipal Corporation of the County of Haldimand*, 20 U. C. R. 574; *Regina* v. *Corporation of the Village of Yorkville*, 22 C. P. 431; *Rex* v. *Severn and Wye R. W. Co.*, 2 B. & Al. 646; *Rex* v. *Commissioners, &c., of Dean*, 2 M. & Sel. 80; *Regina* v. *Bristol Dock Co.*, 1 Gale & Davis. 286, 291; *Rex* v. *Commissioners, &c., of Llandilo*, 2 T. R. 232; *Regina* v. *Wycombe R. W. Co.*, L. R. 2 Q. B. 310; *Regina* v. *Gamble*, 11 A. & E. 69, 72. *Regina* v. *Brown*, 13 C. P. 356. *The Township of Augusta* v. *United Counties of Leeds and Grenville*, 12 U. C. R. 522 is distinguishable. There the motion was, to compel the building of a part of a road and not to repair, and the county council had by by-law appropriated the tolls on the portion already built to the completion of the road, and thus in a manner had contracted for its completion.

J. K. Kerr, contra. The case of *Regina* v. *Brown*, 13 C. P. 356, is not like this; there was no public road there,

while here there is a municipal corporation moved against having a public trust to carry out and public duties to perform. He also referred to the other cases cited and distinguished them, and to *Re Wescott and Corporation of the County of Peterborough*, 33 U. C. R. 280; *Harrison's* Mun. Man., 3rd ed., secs. 409, 410, 413 and notes. He contended that the evidence shewed that the bridge was necessary and would be largely used.

HARRISON, C. J.—I am not prepared to hold that the county council have no discretion in this matter, but without deciding that, I think that the indictment is the proper remedy. Indictment will lie: it is an adequate remedy, and that being so, I do not see why I should take upon myself to grant an extraordinary remedy.

Rule discharged, with costs.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM HILARY TERM, 39 VICTORIA, TO EASTER TERM, 39 VICTORIA.

ACCEPTANCE.

Of building by taking possession.]—The defendant having taken possession of the building, which was upon his own land, *Held*, that this could not entitle the plaintiffs to recover under the common counts. *Munro* v. *Butt*, 8 E. & B. 738, approved of and followed. *Oldershaw* v. *Garner*, 37.

ACCESSORY.

See CRIMINAL LAW, 1.

ACCOMPLICE.

See CRIMINAL LAW, 1.

ACTION.

Suspension of cause of.]—To an action on promissory notes the defence was, that the defendant had given the notes to the plaintiff in consideration that the plaintiff would withdraw a charge of felony which he had made against the defendant in Utah, U. S.

Per WILSON, J. The plaintiff, if not prevented from recovering on the defence set up, would not have been bound first to take criminal proceedings in Utah for the felony before suing here on the notes, the suspension of the civil remedy being a matter of purely local policy. *Toponce* v. *Martin*, 411.

ADMINISTRATION OF JUSTICE ACT.

Purely money demand.]—*See* INSURANCE, 4.

Transfer of action to Chancery.]—*See* BANKRUPTCY AND INSOLVENCY.

AGENT.

Of Insurance Company — Statement as to value—Knowledge of.]—*See* INSURANCE, 3.

AGREEMENT.

To invest money—Construction of.]—*See* CONTRACT, 1.

For settlement of suit.] — *See* PENALTY.

APPEAL.

Per PATTERSON, J., the Legislature did not by the 33 Vic.ch. 7,sec. 6, O., intend the Court to decide upon the evidence questions not discussed before or decided by the Judge at the trial. *Lawrie* v. *Rathbun et al.*, 255.

From Magistrates.]—*See* CONVICTION, 2, 3.

ARBITRATION.

See RAILWAYS AND RAILWAY COS., 3.

ARREST.

How far suspicion of felony, a justification for.]—*See* TRESPASS.

ASSIGNMENT.

Of chose in action.]—*See* INSURANCE, 2.

In trust for creditors.]—*See* BANKRUPTCY AND INSOLVENCY.

ATTORNEY.

How far employment of, protects gratuitous bailee.]—*See* CONTRACT, 1.

BAILMENT.

Of money for investment.]—*See* CONTRACT, 1.

BANK.

Deposit receipt—Payment to administrator on probate obtained by fraud.]—*See* EXECUTORS AND ADMINISTRATORS.

See PAYMENT.

BANKRUPTCY AND INSOLVENCY.

Assignment in trust for creditors—Action by creditor against trustees—Transfer of suit to Chancery—Administration of Justice Act, 1873, secs. 2, 9.]—The declaration alleged, in substance, that the plaintiff was assignee of a mortgage made by one G. W. M. for $2015, on which default had been made, by which the whole principal became due : that G. W. M. was in business in partnership with H. W. M., and becoming embarrassed they assigned all their estate, real and personal, to defendants, in trust to sell the same and distribute the proceeds ratably among their creditors, including the plaintiff: that the defendants had sold the estate, and held the proceeds in trust for the plaintiff and other creditors, and held moneys applicable to the amount due to the plaintiff, and were aware and had notice of the plaintiff's claim, but refused to pay the plaintiff any part of such proceeds : that defendants had realized all the estate, and had long been in a position to divide and pay the same among the creditors, and had in fact paid some of them : and that the greatest portion of the estate so assigned was the sole property of G. W. M.

Held, not a proper case in which to proceed at law under the Administration of Justice Act, 1873, 36 Vic. ch. 8, sec. 2, O., it being impossible in a court of law to administer

the trust and do complete justice without having all the parties interested in the trust before the court; and the suit was therefore transferred, under sec. 9, to the Court of Chancery. *Leys* v. *Withrow et al.*, 601.

BARRISTERS.

Admission of.]—522.

BILLIARD TABLES.

See TAVERN AND SHOP LICENSES, 2.

BILLS AND NOTES.

Promissory Notes — Illegal considerations—Compounding a felony —Foreign law.]—To an action on five promissory notes, the defence was that the plaintiff, in Utah territory in the United States, had charged defendant with felony, (receiving cattle stolen from the plaintiff,) and that in consideration of the plaintiff consenting to withdraw and abstain from prosecuting the charge, defendant agreed to make the notes; and that in pursuance of such agreement, the notes were made, and the plaintiff abstained from prosecuting the charge.

Upon the evidence, set out in the case, the court, differing from the learned judge before whom the case was tried without a jury: *Held*, that an agreement was made that, in consideration of the notes being given, the criminal proceedings which the plaintiff had threatened to take against the defendant, should not be prosecuted; and that the plaintiff therefore could not recover on the notes.

Semble, that a mere threat to prosecute for a criminal offence unless a note be given for money the debtor actually owes, will not avoid the note.

It is of no consequence whether a charge has been formally preferred or not; it is equally an offence to compound in either case.

Held, also, no difference between our own law and that of Utah having being shewn, that the effect of compounding a felony must be presumed to be the same in both countries.

Per WILSON, J.—The plaintiff, if not prevented from recovering on the defence set up, would not have been bound first to take criminal proceedings in Utah for the felony, before suing here on the notes, the suspension of the civil remedy being a matter of purely local policy.—*Toponce* v. *Martin*, 411.

BONUS.

See RAILWAYS AND RAILWAY COS., 1.

BOWLING ALLEY.

See TAVERN AND SHOP LICENSES, 2.

BRIDGES.

Obligation to repair.]—*See* WAYS, 1, 2, 3.

BY-LAW.

Delay in moving to quash.]—*See* TAVERN AND SHOP LICENSES, 4.

Under Temperance Act of 1864—*Defective publication of requisition for.*]—*See* TEMPERANCE ACT OF 1864.

CARRIERS.

Street R. W. Co,—Accident to Newsboy—Right to action—Negligence—

Contributory negligence.]—The deceased, a boy selling newspapers, got on a street railway car at the rear end, and passed through the car to the front platform, where the driver was standing. He stepped to one side behind the driver, and fell off or disappeared from the car, there being no step on that side, and was killed by the car running over him. He had said just before that he was going on some distance further in the car, and the conductor at the time stated that he had reported the want of a step to the owners of the railway, but it had not been attended to. There was plenty of room in the car, but it was proved that passengers were always allowed to stand on the platform. It was not shewn that the deceased had either paid or been asked for his fare, but it appeared that newsboys were allowed to enter the cars to sell newspapers without being charged.

Held, in the Queen's Bench, that the deceased was lawfully on the car, and being so was entitled to be carried safely, whether he was a passenger for reward or not.

Held, also, MORRISON, J., diss., that there was evidence for the jury of negligence on the part of defendants in the absence of the step, and no such contributory negligence on the part of the deceased as should, as a matter of law, prevent the plaintiff's recovery. A nonsuit was therefore set aside.

Upon appeal this decision was reversed, on the ground that unless the deceased was upon the cars as a passenger, on a contract of carriage express or implied, and not as a mere licensee or volunteer, he had no right of action against the defendants for the absence of the step, which was no breach of duty to him, but must take the car as he found it; and that upon the evidence he must be taken to have been a licensee only.—*Blackmore* v. *Toronto Street R. W. Co.*, 172.

CERTIFICATE.

Of architect.]—*See* WORK AND LABOUR, 2.

CERTIORARI.

Return to—Delay in.]—*See* CONVICTION, 2.

CHALLENGE.

For cause.]—*See* CRIMINAL LAW, 1.

CHEQUE.

See PAYMENT.

CHIMNEY SWEEPS.

Powers of Municipal Corporation as to, under 29-30 Vic. ch. 51.]—*See* MUNICIPAL CORPORATIONS, 2.

CHOSE IN ACTION.

Assignment of.]—*See* INSURANCE, 2.

CLOUD ON TITLE.

See SALE OF LAND, 2.

COLLISION.

See SHIPPING.

COMPOUNDING A FELONY.

In United States—Note given for—How far defence available here.]—*See* BILLS AND NOTES.

COMPROMISE.

Of action.]—*See* PENALTY.

CONFUSION OF PROPERTY

Timber.]—The plaintiff had cut timber on lot 24, which was his, and on lot 25, believing that he owned both lots; and all had been drawn away together by him to a lake about three miles distant. Defendants' agent took away a quantity, which had been cut on both lots, being forbidden by the plaintiff, who swore that he could have distinguished the timber cut on each lot by the marks, and told defendants' agent so, but that the agent said he would take it, no matter where it came from. *Held*, in the Court of Queen's Bench that defendants' were liable in trespass for the timber cut on lot 24.

The authorities as to confusion of property reviewed.

On appeal this decision was reversed, and the defendants held not liable, on the ground that the plaintiff was a wrongdoer in taking the timber from lot 25, though under the belief that it was his own: that upon the evidence, fully stated in the judgments, there was a confusion of property of substantially the same quality and value which *primâ facie* entitled defendant to take out of it his own proportion; and that if the plaintiff could distinguish his own from the defendants' it was his duty to point it out, or offer to point it out to the defendants, which he had not done, or shewn a sufficient excuse for omitting. *Lawrie* v. *Rathbun et al.*, 255.

CONSIDERATION.

Illegal consideration for bills and notes.]—*See* BILLS AND NOTES.

CONSTABLE.

Arrest by.]—*See* TRESPASS.

CONSTITUTIONAL LAW.

Power of Dominion Goverment as to trial by jury.]—*See* CONVICTION, 3.

CONTRACT.

Agreement to invest money for plaintiff—Construction—Liability.]—The plaintiff entrusted $500 to defendant, who signed a receipt, stating that it was to be lent, with $300 of his own, to one H., "being secured on the said H.'s storehouses," and in defendant's name, and bearing interest at 9 per cent. payable to defendant, who would, on receipt of the interest, pay to the plaintiff her interest, $45 per year, and at the expiration of two years defendant to pay over to plaintiff both principal and interest; but defendant not to be responsible for the money except as paid by H. to him. Defendant who acted gratuitously, and, as he stated, under the advice of a solicitor, finding that H. had not yet obtained the patent, advanced the $800 to H. on the security of a bond, not registered, conditioned that H. should give him a mortgage on the propertywithin a month after receiving the patent, or pay

the money in two years; but H., after the patent issued, gave a prior mortgage to another person, and became insolvent. The declaration alleged that defendant promised to invest the money on the security of a mortgage on the storehouses, and defendant admitted that this was the agreement. It was argued that he was a gratuitous bailee only, and not shewn to have been guilty of negligence; but, *Held*, that it was a case of contract founded upon good consideration, the entrusting him with the money, and that having broken it he was liable.

Upon appeal this judgment was affirmed. The defendant, it appeared, without the plaintiff's authority, took a second mortgage upon the property, nearly two years after the bond, extending the time of payment for three years for the principal and accrued interest.

Held, that this was clearly such a breach of his agreement, and such a dealing with the plaintiff's money, as to make him liable. *Held*, also, that the plaintiff should recover interest at 9 per cent. for two years only, and at 6 per cent. thereafter.

Per PATTERSON, J., the agreement to "secure" the money upon the storehouses required defendant to obtain a valid legal charge thereon.

Semble, that defendant, not being an attorney, would not have been liable, if, having undertaken gratuitously to invest the plaintiff's money in a mortgage, he had instructed a competent attorney to attend to the matter, and relied upon his advice. *Holmes et ux.* v. *Thompson*, 292.

2. *Agreement to get out logs—Construction — Verdict — Damages.*]—The plaintiff agreed to cut, draw, and deliver for the defendants at a specified place 4,000 standard logs at 50 cents each; also, to make all branch roads, the defendants agreeing to make the main road: "the defendants to provide the pine timber, which is to be cut on the lots mentioned in the schedule A, hereon endorsed." This schedule enumerated five lots, containing 1,800 acres.

Held, that defendants were not bound to point out to the plaintiff the trees to be cut on the lots in question, but that it was sufficient that there were trees on these lots, as the jury found, enough to make 4,000 logs.

The jury, in answer to questions, found that the plaintiff had cut and delivered only 600 logs, and had received $400, so that he was overpaid $100; but they found also defendants did not make the main road in reasonable time to enable the plaintiff to get the logs out, by which the plaintiff had sustained $10 damages. *Held*, that the plaintiff was entitled to a verdict for $10, notwithstanding that he had been overpaid. *Stubbs* v. *Johnston et al.*, 466.

See SALE OF GOODS, 3.

CONVICTION.

1. *Quashing—Costs.*]—It is not the practice to give costs on quashing. *Regina* v. *Johnston*, 549.

2. *Certiorari—Appeal under* 38 *Vic. ch.* 11, *O.—Delay—Transmission of papers—Return to certiorari—Duty of justices.*]—S. on the 9th of February, 1875, was convicted before justices of an offence against the Act for the sale of spirituous liquors, 37 Vic. ch. 32, O. On the 27th he obtained a *certiorari* to the justices to return the conviction into the Queen's Bench, which was not served until the 9th of July. In the

meantime, on the 3rd of March, he procured a summons from the County Judge by way of Appeal from the conviction, under 38 Vic. ch. 11, O., alleging, as a ground for obtaining it so late, that the delay arose wholly from the default of the justices. He persisted in his appeal, notwithstanding the *certiorari*, but the Judge refused to adjudicate on the merits, holding that it had not been made to appear to him that the delay arose wholly from the default of the convicting justices, and therefore that he had no jurisdiction.

On the 13th of September the justices returned to the *certiorari* that before its delivery to them they had at the request of S. transmitted the conviction and papers to the County Judge upon the appeal, under 38 Vic. ch. 11, O. In November, S., having procured the papers to be returned by the County Court clerk at Barrie to the magistrates' clerk at Orillia, moved to quash the return to the *certiorari*, and for another writ, or for an attachment for not having returned the conviction in obedience to it, or for an order to return the conviction forthwith, or to amend the return by including the conviction therein. In support of this motion it was urged that the magistrates wrongfully put it out of their power to return the writ by transmitting the papers to the clerk of the County Court when they must have known that the appeal was too late.

The application was refused, for S., having procured the transmission of the papers for his own appeal, could not insist that it was wrong; it was apparent that he had abandoned the *certiorari* in order to carry on his appeal; and when he served the writ he knew that the justices had not the papers to return.

Quære, as to the propriety of the County Court clerk returning the papers to the justices' clerk.

Semble, that the justices could not properly have refused to transmit the papers on the ground that the appeal was not made in time; but that on the recognizance being furnished they should transmit them, at least within the month, leaving it to the County Court Judge to decide as to the cause of delay.—*Regina* v. *Slaven*, 557.

3. *Malicious injury to property—Conviction—Appeal—Trial without jury—Legislative power—Proof of malice*—32-33 *Vic. ch.* 22, *secs.* 29, 66; *ch.* 31, *sec.* 66, *D.*]—On the 8th November, 1875, an information was laid against B. before the Police Magistrate of St. Thomas, by one N., under the 32-33 Vic. ch. 22, for having unlawfully and maliciously broken and injured a fence round the land of N. The defence set up was, that the fence encroached upon B.'s land, but there was evidence which, if believed, went to shew that B. did not commit the injury under a *bonâ fide* exercise or belief of a right; and the magistrate convicted and fined him. B. appealed to the General Sessions of the Peace, where neither side asked for a jury; the Court urged them to have one, but the respondent, N., refused; and the Court having heard the evidence, decided that B. acted, though mistakenly, under a *bonâ fide* belief that he had a right to remove the fence, and without malice; and they ordered the conviction to be quashed, with costs. N. then applied to quash this order, upon the ground, amongst others, that the case could not be tried without a jury; but, *held*, that the 32-33 Vic. ch. 31, sec. 66, D., which authorizes the Court to try without

a jury, is within the powers of the Dominion Parliament, and that the case having been properly before the Sessions, this Court could not review their decision upon the merits.

Sec. 66 of the 32-33 Vic. ch. 22, does not dispense with proof of malice in such cases, but, read in connection with sec. 29, merely means that the malice need not be conceived against the owner of the property injured. *Regina* v. *Bradshaw*, 564.

CORPORATION.

Mode of testing the existence of.]—*See* PUBLIC SCHOOLS.

See MUNICIPAL CORPORATIONS.

COSTS.

It is not the practice to give costs on quashing a conviction. *Regina* v. *Johnston*, 549.

COVENANT.

To take care of fruit trees.]—*See* LEASE.

CRIMINAL LAW.

1. *Indictment for murder—Evidence of accomplice—Empannelling jury — Challenge for cause — Trial of.*]—Upon a trial for murder it appeared that the deceased was found dead in his stable in the morning, killed by a gun shot wound. The prisoner was a hired man in his house. His widow, the principal witness for the Crown, testified that she and her husband went to bed by ten o'clock: that afterwards her husband, being aroused by a noise in the stable, got up and went out: that she heard the report of a gun: that a few minutes after the prisoner tapped at the door, which she opened: that he said he had done it, and it was well done: that she asked him if he had killed her husband, and he said he had, and that it was for her sake he had done it: that he told her to keep quiet, and give him time to get into bed, which she did: that she waited a few minutes and then gave the alarm, calling the prisoner and another man who was sleeping in the house, who went out together and discovered the body. She also swore that the prisoner had previously told her he was planning the murder, but that she then did not then consider him in earnest. There was evidence, apart from her own, of her improper intimacy with the prisoner; and a true bill had been found against her for the murder.

The jury were told that there was no direct evidence corroborating her testimony; the rule requiring the evidence of an accomplice to be confirmed was explained to them; and they were directed that before convicting they should be satisfied that the circumstantial evidence relied upon by the Crown did corroborate her testimony. They convicted; and questions were reserved under C. S. U. C. ch. 112, whether the widow was an accomplice, and whether there was sufficient evidence to submit to the jury. *Held*, that, whether she was an accomplice or not, there was no ground for disturbing the verdict.

Quære, per HARRISON, C. J., whether the widow was an accessory after the fact, and whether, if so, she was such an accomplice as to require corroboration, according to the rule of practice.

Per MORRISON, J., and WILSON, J., she was an accessory after the fact.

After some jurors had been peremptorily challenged by the prisoner, and others directed by the Crown to stand aside, and when only one had been sworn, one M. was called and challenged by the prisoner for cause. At the suggestion of the Court, and with the consent of counsel, M. was directed to stand aside by the Crown "till it was ascertained whether a jury could be empannelled without him, on the understanding that if it appeared necessary or expedient the challenge for cause should be tried in the usual way." After the prisoner had made nineteen peremptory challenges, a juryman was called whom the prisoner desired to challenge peremptorily. The counsel for the Crown then asked that the question of M's competency should be tried in the usual way. The prisoner's counsel objected, but the Judge ruled with the Crown, and he certified that he so ruled because it was in accordance with the arrangement under which the juror was directed to stand aside: that no exception was taken to this ruling: that he was not asked to note any objection to the mode of empannelling the jury; and that he was first asked to reserve the question after the assize had finished, when, upon the consent of counsel for the Crown, it was added to the other questions reserved. *Held*, that the jury were properly empannelled. *Regina* v. *Smith*, 218.

2. *Misdemeanor—New trial—Obstructing navigable river—Evidence—Judge's charge.*]—In no case of misdemeanor, after verdict of acquittal, will a new trial be granted, on the ground that the verdict is against evidence or the weight of evidence. In cases of *non-feasance*, such as non-repair of a highway, a new trial may be ordered on the ground of misdirection, or improper reception or rejection of evidence; but in cases of misfeasance, such as obstruction of a highway, it is doubtful if a new trial should be granted in any case.

Where the defendants were indicted for obstructing a navigable river by the erection of a wharf, and there was no evidence that the part covered by the wharf had ever been navigated by vessels of any size, but it was shewn only that the prosecutor was prevented by it from landing there with his skiff, and the wharf was proved not to interfere with the navigation: *Held*, that the jury were rightly directed that on this evidence the only verdict which could be rendered was not guilty.

Such a direction is not so much a direction on the law as a strong observation on the evidence, which may properly be made in a proper case without being open to the charge of misdirection.—*Regina* v. *The Port Perry and Port Whitby R. W. Co.*, 431.

Compounding a felony.]—*See* BILLS AND NOTES.

See CONVICTION.

DAMAGES.

See CONTRACT, 2.—SALE OF LAND, 2.

DEBENTURES.

See RAILWAYS AND RAILWAY COS., 1.

DEED.

Omission to index.]—*See* REGISTRATION.

DEFAMATION.

Libel—Privileged communication—Evidence of malice.]—The plaintiff had been the agent of defendants, an insurance company, and had obtained about 1600 policies for them. Having left them, he entered the service of another company, and canvassed actively for that company among defendants' customers, asking those whose policies were about to expire whether they wished to be insured or to insure again. Defendants gave evidence that he asked several of them to *renew* their policies, not telling them that he was acting for another company, and that these persons believed he was acting for defendants. Defendants' officers were respectively informed of all this, and that the plaintiff was representing himself as their agent. Under these circumstances defendants published in a newspaper an advertisement headed "Caution," and stating that, notwithstanding plaintiff's false statements to the contrary he was no longer their agent. The plaintiff sued for this alleged libel. There was no proof of malice in fact. It was objected that the communication was privileged, but the objection was over-ruled, and this question was left to be dealt with by the Court upon the evidence, upon the leave which was reserved to move for a nonsuit, neither side requiring any question to be left to the jury.

Held, that the occasion was privileged, and that neither the expression "false statements," nor the mode of publication, afforded sufficient evidence of malice. The verdict for the plaintiff was therefore set aside, and a nonsuit entered.

Semble, that the learned Judge at the trial might properly have ruled that there was a privilege, and no evidence of malice to go to the jury. —*Holliday* v. *The Ontario Farmers' Mutual Ins. Co.*, 76.

DRAINS.

See WATERS AND WATER COURSES.

DUTY.

Payable for tavern licenses.]—*See* TAVERN AND SHOP LICENSES.

Payment of, on sale of goods.]—*See* SALE OF GOODS, 1.

EMPANNELLING JURY.

See CRIMINAL LAW, 1.

ESTOPPEL.

Diverting water—Riparian rights—Estoppel.]—To a declaration for diverting water from the plaintiff's mill and premises, and using it to work defendant's sash factory, defendant pleaded, on equitable grounds, that while one R. F. C. owned the mill, defendant's father, T. C., owned certain lands higher up the river, and erected a saw mill, which was afterwards changed into a sash factory, and opened a sluice-way in the dam, and cut the bank of the canal to said saw mill and factory, and used enough of the water to work the same, which are the grievances now complained of: that all this was done with the knowledge and consent of said R. F. C., through whom plaintiff claims; and defendant acquired the saw mill, &c., as they were used by T. C., and the alleged grievances are a user by defendant as they were so used by R. F. C.

The plaintiff replied by way of estoppel a judgment recovered by one D., through whom the plaintiff claimed title, in an action against R. & T., then the defendant's tenants in occupation of the sash and blind factory, in which D. sued for a similar diversion of water to that sued for in this action. The replication, after setting out the pleadings in that action, and the judgment recovered, for $50 damages, alleged that it was defended by R. & T. at the instigation and for the benefit of the now defendant, as their landlord, who employed the attorney and counsel, and paid the costs, and was the actual defendant, R. & T. being only the nominal defendants; and that the issues therein disposed of were substantially the same as those raised here, and the wrongs now complained of are a continuation of the wrongs for which D. then recovered judgment.

Held, bad, for such judgment could form no estoppel, the defendant not being a party to the record in that action, nor capable of being substituted as such for his tenants, as in ejectment. *Diamond* v. *Coleman*, 632.

EVIDENCE.

Discovery of new corroborative evidence.]—*See* NEW TRIAL, 1.

Effect of finding of Judge, upon.]—*See* NEW TRIAL, 2.

Of malice in libel.]—*See* DEFAMATION.

Of negligence.]—*See* CARRIERS.

See APPEAL.

EXECUTORS AND ADMINISTRATORS.

Intestacy—Administration obtained by fraud—Payment made under—Subsequent administration—Liability—Deposit receipt—Construction.]—One I., who died in 1870 in Ireland, had deposited money at the branch of defendants' bank in Cobourg in 1869. Letters of administration were granted on 25th April, 1872, by the Probate Court of the District Registry, at Ballina, in Ireland, to J. G., at whose house I. died, who represented himself to be his cousin-german and only next of kin. An exemplification thereof was recorded in the Superior Court of Montreal, and on this the bank, in September, 1872, paid over the amount to G.'s attorney in Montreal, who handed to them the receipt which he had obtained from G. It appeared, however, that G. had obtained the administration by fraud, not being I.'s next of kin. In August, 1872, administration was granted by the Court of Probate in Ireland to the plaintiff, I.'s brother, and in May, 1872, the plaintiff notified defendant's manager at Cobourg, not to pay over any money except to himself.

The evidence shewed that the Probate Court at Ballina, had power to grant the administration, and by the C. S. L. C. ch, 91, the administrator of any one dying abroad, is recognized and has the same power in Lower Canada, as in the country where he was appointed or resides.

Held, 1. That the Ballina administration, though obtained by fraud, was valid until revoked by some express judicial act, and was not revoked by the mere issue of the Dublin grant; 2. That by the Lower Canada law J. G. was entitled under that grant to receive payment in Montreal; 3. That although the money was payable at Cobourg, defendants paid it rightfully at their head office at Montreal; 4. That defendants were bound to pay it on

demand, made under the Ballina grant, notwithstanding the notice served on them; 5. That it was a payment made in Montreal in good faith to the ostensible creditor, under article 1144 and 1145 of the L. C. Code Civile.

Remarks upon the necessity for some amendment of the law, in order to prevent the obtaining of letters of administration by fraud and without giving security. *Irwin* v. *Bank of Montreal*, 375.

EXTRAS.

Under building contract.] — *See* WORK AND LABOUR, 2.

FACTORS' ACT.

See PRINCIPAL AND AGENT.

FELONY.

Arrest under suspicion of.]—*See* TRESPASS.

Compounding felony.]—*See* BILLS AND NOTES.

See CRIMINAL LAW.

FENCES.

See RAILWAYS AND RAILWAY COS., 2.

FOREIGN LAW.

See BILLS AND NOTES—EXECUTORS AND ADMINISTRATORS.

FRUIT TREES.

Covenant to take care of.]—*See* LEASE.

GAMBLING.

See TAVERN AND SHOP LICENSES, 1.

GRATUITOUS BAILEE.

See CONTRACT, 1.

HARBOUR DUES.

See MUNICIPAL CORPORATIONS, 3.

INFANTS.

Sale of liquor to.]—*See* TAVERN AND SHOP LICENSES, 1, 2.

INFORMATION.

See PUBLIC SCHOOLS.

INSURANCE.

1. *Marine insurance—Deck load—General average.*]—Defendants insured the plaintiffs's vessel by a policy containing nothing as to deck loads. A hold full and deck load of coal was shipped upon her at Cleveland for Toronto, by a bill of lading, which provided "all property on deck at risk of owners." She went ashore during the voyage, and the coal upon deck was thrown overboard in order to get her off and save the vessel and the rest of the cargo, which was thereby accomplished. It was admitted that the usage at the date of the policy, as well as at the time of the loss, was for vessels trading between Toronto and Cleveland to carry deck loads.

Held, looking at the special terms of the bill of lading, that the defendants were not liable to contribute to their share of the loss.

Semble, however, that but for the bill of lading the defendants would be liable, for that the usage to carry deck loads being admitted, the jettison of such load, in the absence of any usage to the contrary, must be contributed for in general average.—*Spooner et al.* v. *The Western Assurance Co.*, 62.

2. *Assignment of policy — Forfeiture by subsequent act of assignor —35 Vic. ch. 12, O.; 36 Vic. ch. 44, sec. 39, O.*]—One G. insured two houses with defendants, a mutual insurance company, and then mortgaged them to the plaintiff, to whom he assigned the policy with defendants' assent. Afterwards G., in violation of one of the conditions of the policy, executed another mortgage to other persons, of which no notice was given to the defendants. The assignment to the plaintiff was upon the express condition that the plaintiff should be bound by all the conditions of the policy, and that the policy should continue to be voidable as though the assignment had not been made.

Held, that the policy was avoided by G.'s act as against the plaintiff, who could recover upon it only in right of G.

Burton v. *The Gore District Mutual Insurance Co.*, 12 Grant 156, 14 U. C. R. 342, commented upon and distinguished, upon the grounds of the change since made in the law as to assignment of choses in action, by 35 Vic. ch. 12, O., and of the express condition in the assignment, and the provisions of the 36 Vic. ch. 44, sec. 39, O., relating to insurance companies.—*Smith* v. *Niagara District Mutual Insurance Co.*, 570.

3. *Statement as to value—Knowledge of agent.*]—To an action on a fire policy on a dwelling house and barns, defendants pleaded that by the application, which formed part of the policy, it was declared that any misrepresentation would render the policy void; and that in the application the plaintiff falsely represented that the value of the dwelling house insured was $2,000, whereas it was not of that value, but of a much smaller value. Another plea stated the false representation to be that $1,500 was not more than two-thirds of the value of the buildings, whereas it was far more.

The plaintiff replied to each plea, on equitable grounds that one H., being defendants' secretary and their duly authorized agent, and having full knowledge of the value of the buildings, prepared the application, and without any enquiry of the plaintiff, but acting on his own knowledge of the buildings and their value, acquired in the proper discharge of his duty as such secretary and agent of defendants, wrote therein the said values; and the plaintiff honestly believing the value to be correct, and without any concealment, falsehood, or fraud, at the request of said H., signed said application.

Held, on demurrer, a good replication, for the representation as to value was not a warranty, but a statement of matter of opinion, a mistake in which, in the absence of fraud, could not avoid the policy.

Held, also, that if no fraud were necessary to support the plea, the replication would be a good answer, for the knowledge of the agent, acquired as alleged, would be the knowledge of defendants. *Redford* v. *The Mutual Fire Insurance Co. of Clinton.* 538.

4. *Policy of insurance effected by S.—Loss payable to plaintiffs—Right*

of plaintiffs to sue—36 *Vic. ch.* 8, *sec.* 2.]—The declaration on a policy of insurance alleged that defendants agreed to insure one S. against loss on wheat and flour owned by the assured, and that the amount of loss, if any, should be paid by defendants to the plaintiffs. It then averred that the policy was delivered by defendants to plaintiffs, and that thence until and at the time of the loss the plaintiffs were interested in the wheat and flour to the amount insured.

Held, that the declaration shewed sufficient to entitle the plaintiffs to sue in their own name, for the plaintiffs' interest was sufficiently averred, and their claim was a purely money demand, for which, though an equitable one, they were entitled under the Administration of Justice Act, 36 Vic. ch. 8, sec. 2, to proceed at law. *The Bank of Hamilton* v. *The Western Assurance Co.*, 609.

See PAYMENT.

INTEREST.

Computaiton of.]—*See* CONTRACT, 1.

Liability for, on sale of land.]—*See* SALE OF LAND, 1.

JUDGMENT.

Estoppel by.]—*See* ESTOPPEL.

JURY.

Empannelling — Challenge of.]—*See* CRIMINAL LAW, 1.

Trial of appeal at sessions, without.]—*See* CONVICTION, 3.

JUSTICE OF THE PEACE.

See CONVICTION.

JUSTIFICATION.

How far suspicion of felony a justification for arrest.]—*See* TRESPASS.

LANDLORD AND TENANT.

See LEASE.

LEASE.

Construction—Act respecting short forms — Covenant to take care of trees.] — A lease, purporting to be made in pursuance of the Act respecting Short Forms of Leases, contained this proviso: "Proviso for re-entry *by the said lessor*, on non-payment of rent, *whether lawfully demanded or not*, or *on* non-performance of covenants, *or seizure or forfeiture of the said term for any of the causes aforesaid*," the words in italics not being in the short form given by the statute. *Held*, that the addition of these words did not exclude the application of the statute; and that the proviso extended to covenants after as well as before it in the lease.

The lessees covenanted "to take proper care of the fruit trees." There were fruit trees then on the demised premises. *Held*, that the covenant did not extend to additional fruit trees planted afterwards *by the lessor*, with the assent of the lessees. *Crozier* v. *Tabb et al.* 54.

LICENSES.

See TAVERN AND SHOP LICENSES.

LIQUIDATED DAMAGES.

See WORK AND LABOUR, 1.

LIQUOR—SALE OF.

See TAVERN AND SHOP LICENSES.

TEMPERANCE ACT OF 1864.

LOGS.

Agreement to get out—Construction of.]—*See* CONTRACT, 2.

MALICIOUS INJURY TO PROPERTY.

Conviction for.]—*See* CONVICTION, 3.

MANDAMUS.

To municipality to hand over bonus debentures to railway.]—*See* RAILWAYS AND RAILWAY COS., 1.

See WAYS, 3.

MARINE INSURANCE.

See INSURANCE.

MASTER AND SERVANT.

Wrongful dismissal.]—Action for wrongful dismissal of the plaintiff, who had been hired by defendant as a merchant's clerk for a year. Plea, that the defendant had large sums of money stolen from him by some persons; that the plaintiff being then defendant's employment, and having as such clerk had said money in his possession, did not, nor would account for the same, whereby defendant had reason to, and did suspect that the plaintiff had feloniously embezzled the money, and by reason thereof defendant dismissed him. *Held*, bad, for no facts were stated to justify defendant's alleged suspicion. *Patterson* v. *Scott*, 642.

MEMORANDA.

Barristers—Admission of.]—522.

Queen's counsel—Appointment of.]—523.

MISDEMEANOR.

See CRIMINAL LAW, 2.

MISDIRECTION.

Nuisance — Criminal law.]—Defendants were indicted for nuisance in obstructing a navigable river by erection of a wharf. The wharf was proved not to interfere with the navigation, and the Judge directed the jury that on the evidence they must find not guilty. *Held*, not so much a direction on the law as a strong observation on the evidence, which might properly be made in a proper case without being open to the charge of misdirection. *Regina* v. *Port Perry and Port Whitby R. W. Co.*, 431.

MISTAKE.

As to construction of agreement——*Rectifying.*]—*See* PENALTY.

MONEY PAID.

Excessive demand — Right to recover back excess.] — *See* SALE OF GOODS, 1.

MONOPOLY.

See MUNICIPAL CORPORATIONS, 2.—TAVERN AND SHOP LICENSES, 1.

MORTGAGE.

Right of mortgagee to maintain trespass or trover for cutting timber—Liability of joint wrongdoers.]—The first count of the declaration alleged that one B. was the owner of certain lands, described, in fee simple, and mortgaged it to the plaintiffs in fee, subject to a proviso for redemption on payment of $1,350, and interest, by instalments, as specified: that it was provided in the mortgage that B. should not, without the plaintiffs' written consent, cut down or remove any of the standing timber until the first four instalments of principal, and interest up to a certain date, should have been paid; and that if default should be made in paying the interest the whole principal should become due. It then alleged a default in payment of principal and interest, and that defendants afterwards, without plaintiffs' leave, and against their will, entered on the land and cut down and removed timber and trees, thereby injuring the land, and making it an insufficient security to the plaintiffs for the mortgage debt. There was also a count in trover for the trees.

It appeared that the mortgage was one under the Act respecting short forms, with the ordinary proviso for possession by the mortgagor until default, and a covenant not to cut timber, as alleged. The jury, in answer to questions, found that R. had cut down the timber, the other defendant, E., assisting him, in order to sell it and leave the place depreciated: that the damage thus done was $150; and that defendants did not purchase the timber from R. (as had been asserted) believing that he was entitled to sell it; but they said, after their verdict had been recorded against both defendants on these answers, that they did not intend to find E. guilty.

Held, that the action was maintainable, and the verdict properly entered against both defendants, the jury having found them to be joint wrongdoers: that the mortgagee was not restricted to his action on the covenant, but might certainly maintain trover; and *semble*, that, though not in actual possession, he might, under the circumstances, maintain trespass also.

Quære, whether the first count was in case for injury to plaintiffs' reversionary interest, or in trespass.

Semble, that it was in trespass; but *held*, that it disclosed a good cause of action. *Mann et al.* v. *English et al.*, 240.

MUNICIPAL CORPORATIONS.

1. *Unauthorized expenditure—Liability for.*]—The plaintiffs sued defendants for lumber supplied to them for building an engine house, etc. Defendants pleaded that the claim was for a debt falling due in 1874, and was not within their ordinary expenditure during that year: that no estimate was made by them, nor an assessment or levy made to pay the debt, nor any by-law passed to create such debt or to impose a rate to pay it; and defendants had not in 1874, nor at the commencement of this suit, any moneys out of which to pay the same.

It appeared that by by-law passed on the 13th July, 1874, defendants appropriated $9,300 received from the Municipal Loan Fund for certain specified works to be done in the municipality, including that for which this lumber was supplied, but the expenditure was over $12,000, and there was in that year a deficiency of

$5,000, and more than two cents in the dollar would be required to meet this debt, with the other liabilities.

Held, that the plaintiffs could not recover. *Potts et al.* v. *The Corporation of the Village of Dunnville*, 96.

2. *City Corporation—By-law regarding chimneys*—29–30 *Vic. ch.* 51, *sec.* 296, *sub-sec.* 32, *secs.* 223, 224, 372, *sub-sec.* 2.—*Costs.*]—A city by-law passed on the 26th of October, 1868, providing that no persons other than the chimney inspectors appointed by the Municipal Council (of whom there were to be three), should sweep or cause to be swept, for hire or gain, any chimney or flue in the city, was held to be beyond the power of the Corporation, under the authority given to them to enforce the proper cleaning of chimneys; and a conviction under it was quashed.

It is not the practice to give costs on quashing a conviction. *Regina* v. *Johnston*, 549.

3. *Harbour dues—Power of corporation to impose—Imprisonment—* 36 *Vic. c.* 48, *secs.* 372, 378, *O.*]—The corporation of a town has, under 36 Vic. ch. 48, sec. 378, sub-secs. 1, 3, 4, O., no power to impose harbour dues on the shippers or consignees of goods shipped or landed at the harbour, but only on vessels. Clauses of a by-law authorizing such charges, and the seizure and sale of goods therefor, the recovery thereof by action, and the punishment of persons evading them, were therefore quashed.

A provision that any person encumbering, injuring, or fouling any public wharf, should be liable to a penalty named, and in default of payment or sufficient distress, to imprisonment "for not less than ten nor more than thirty days." *Held*, bad, twenty-one days being the limit authorized by sec. 372, sub-sec. 13. *Re McLeod and Corporation of the Town of Kincardine*, 617.

Bonus to railways.]—*See* RAILWAYS AND RAILWAY COS., 1.

Police power of.]—*See* TAVERN AND SHOP LICENSES, 1.

See TAVERN AND SHOP LICENSES—WATERS AND WATER COURSES—WAYS, 1, 2, 3.

MURDER.

See CRIMINAL LAW, 1.

NEGLIGENCE.

Collision occasioned by.] — *See* SHIPPING.

In carriage of passengers.]—*See* CARRIERS.

NEWSBOY.

Accident to.]—*See* CARRIERS.

NEW TRIAL.

1. *Discovery of new evidence.*]—The discovery of new corroborative testimony is no ground for a new trial, nor is the intention to produce a witness in person whose evidence was taken under a commission and read to the jury. —*McDermott* v. *Ireson*, 1.

2. *Finding of Judge.*]—Remarks as to the effect of the finding of a

Judge upon evidence. *Scott* v. *Dent*, 30.

See CRIMINAL LAW, 2—RULES AND ORDERS—SHIPPING.

NUISANCE.

See CRIMINAL LAW, 2.

PAYMENT.

Principal and agent — Payment to agent by cheque.]— Defendant, through one B., the plaintiffs' agent, effected a life policy with the plaintiffs. B., who had authority to receive the premium, brought the policy with the receipt for the first premium, issued from the plaintiffs' head office, to defendant who was in charge of a branch of the bank at which B. kept his account. Defendant drew a cheque on another branch of the bank, and B. requested him to place the amount to the credit of his bank account, which was done in the usual way, and the cheque charged to defendant; but B.'s account was at the time overdrawn, and he afterwards became insolvent.

Held, that the payment thus made to B. was a payment to the plaintiffs. *The Ætna Life Ins. Co.* v. *Green*, 459.

PENALTY.

Seduction — Agreement for settlement— Construction — Non-payment of the sum agreed on—Revival of right to sue.]— To an action for the seduction of plaintiff's daughter, the defendant pleaded, on equitable grounds, that the plaintiff and his daughter had entered into an agreement under seal with defendant for the settlement of the suit, and other matters (setting it out), by which the amount to be paid by defendant was fixed at $120, which the defendant agreed to pay by instalments of $15 at the time specified; and it was stipulated that if defendant should not make these payments punctually the agreement should be void. The plea then set out that defendant paid three instalments, but by accident omitted to pay the fourth, which he was ready and willing to pay; and he submitted that the proviso to avoid the agreement on non-payment was, on the true construction of the agreement, a penalty only, against which he should be relieved, and if not, that it differed from the intention of both parties, and should be reformed. The attorney who drew the agreement, said that he put in this proviso of his own accord, without instructions to do so, but that it was read over to the parties, and executed in duplicate, each party taking one.

Held, that there was no ground for saying that the proviso was introduced by mistake: that it was not a penalty against which defendant should be relieved, being a reservation only of an existing legal right; and that it formed no defence therefore to this action. *Boland* v. *McCarroll*, 487.

See WORK AND LABOUR, 1.

POSSESSION.

Building contract.]—Taking possession of building just erected on one's own land is not necessarily an acceptance.—*Oldershaw* v. *Garner*, 37.

PRINCIPAL AND AGENT.

Factors' Act.] — Questions were raised as to the power of one I. to sell the goods in question, whether he was an agent within the Factors' Act, &c.; but the finding of the jury, which the Court refused to disturb, made it unnecessary to decide them. —*McDermott* v. *Ireson*, 1.

See AGENT—PAYMENT.

PRIVILEGE.

Privileged communication.] —*See* DEFAMATION.

PROBATE.

See EXECUTORS AND ADMINISTRATORS.

PUBLIC SCHOOLS.

Replevin — Formation of union school sections—Existence of corporations—Mode of testing.]—Replevin. Plea justifying under a distress for school rate for a union school section No, 2, Raleigh and Tilbury E., alleged to have been duly formed by the reeves of said townships and the local superintendent, of which section defendants were trustees, and averring that the rate was imposed by defendants to raise the necessary sum to purchase a school site, and that the plaintiff was rated in respect thereof. Replications, 1. That the said section was not formed as alleged. 2. That the alleged union school section was on or about 24th December, 1873, pretended to be formed by the reeves of the said townships and the superintendent by uniting section 6 of Tilbury with parts of sections in Raleigh: that the plaintiff resided and was a ratepayer within one of the sections affected by the proposed formation of said section: that no notice was given to him and others intended to be affected by such formation, or of any alteration in the sections in said townships: that the inspector of the county has not transmitted to the clerks of said townships any copy of the resolution to form said section, nor have the reeves of the said townships, with the inspector or otherwise, equalized the assessment within said section.

Held, on demurrer, replications bad, for that it was not open to the plaintiff in this suit to contest the validity of the formation of the school section on the grounds taken, his proper course being by information in the nature of *quo warranto* to determine the defendants' right to the office of trustee.

The plaintiff replied also that the defendants were not on the 24th of December, 1873, a corporation duly formed as alleged. Upon the trial it appeared that the union section for which the defendants assumed to be trustees had been formed by adding to a section in one township parts of two sections in another township: *Held*, that a union school section can be formed only of two sections, not of parts of sections; and that the objection therefore being not to the regular exercise, but to the existence, of the power to form such sections, and the facts being undisputed the validity of the formation might be questioned in this action. *Askew* v. *Manning*, 345.

PURELY MONEY DEMAND.

Claim for at law, under Administration of Justice Act.]—*See* INSURANCE, 4.

QUEEN'S COUNSEL.

Appointment of, 523.

QUO WARRANTO.

See PUBLIC SCHOOLS.

RAILWAYS AND RAILWAY COMPANIES.

1. *Railway bonus — Application for mandamus to issue debentures— Commencment of the work—Omission to file plans.*]—A county by-law was passed on the 12th December, 1873, to aid a R. W. Co. by a bonus of $80,000, and to issue debentures therefor, under the authority of the clauses of the Municipal Act of 1873, then in force. The by-law required that the debentures should not be delivered to the trustees appointed to receive them until the company should have agreed that the amount thereof should be wholly expended upon the construction of the line within the county: that 75 per cent. of the amount should be advanced as the work progressed, on the engineer's certificate, and the balance on completion of the road; and that the portions of the railway within the county should be commenced within one and finished within three years of the passing of the by-law.

On application for a mandamus to the county to deliver these debentures to the trustees, it appeared that on the 24th of November, 1874, the company, by agreement with the county, after reciting the by-law, covenanted to commence that part of the road within the county and in one and complete it in three years from the passing of the by-law; and that they would only ask for the proceeds of the debentures, as to 75 per cent. thereof "to pay for work done *and expenses incurred* during the progress of said work within the county, and as to 25 per cent. thereof to pay for work done and expenses incurred on finally completing said railway within the county, and that the whole proceeds of the debentures should be expended in the construction of the said railway within the county, and not otherwise or elsewhere." This agreement was handed to the Warden on the 7th of December, 1874, (within five days of the time limited by the by-law for commencing the work), but was not executed by the county, and on the same day the debentures were demanded. The company had in that month made some purchases of rights of way. On the 4th of December, they entered into a contract with one C. for the construction of 14 miles of the road within the county, to be begun within five days and completed by 1st of September, 1875, but it contained a a clause enabling the company to suspend the work at any time without being liable for damages. C. began work on the 10th of December, and continued till the 15th of February, 1875, for which he received about $800. He was told that he must begin by the 12th of December in order to enable the company to get the debentures.

The company had not filed their plans and survey as directed by the Railway Act, C. S. C., ch. 66, without which they had no authority to begin their work, and were bound to no particular route.

Held, in the Queen's Bench, that the company were not entitled to the mandamus, for they had not legally located their line, and were bound to no route; they had no power to begin the work as they had done;

and from all the facts, more fully stated in the case, it appeared that they had not done so in good faith.

Semble, that there was not a sufficient variance between the agreement required by the by-law and that executed by the company to have alone furnished an answer to the application, though they were not clearly identical.

Per HARRISON, C. J.—The whole matter was one of contract, and the company, if entitled to the debentures, had another remedy, either at law or in equity, which would be more convenient and appropriate than a writ of mandamus.

The company had a line of 100 miles to construct, which would cost $1.500,000. Their capital stock was only $50,000, of which not quite ten per cent. had been paid up; and including the whole stock, and the bonuses granted, they had only $160,000. *Quære*, per WILSON, J., whether, before ordering the debentures to be handed over, the Court could have required more stock to be called in. *Semble*, not; but it was suggested that the by-law should provide for this; and that to carry such by-laws a certain proportion of the whole number of votes of the locality should be required.

On appeal from the above judgment, DRAPER, C. J. of Appeal, and PATTERSON, J., were of opinion that the mandamus was properly refused —BURTON, J., and MOSS, J., that it should have been granted. The Court being thus equally divided, the judgment was affirmed, without costs.

Per DRAPER, C. J., and PATTERSON, J.—The omission to file the plans, &c., was a fatal objection, for without this, under C. S. C. ch. 66, sec. 10, the execution of the railway could not be proceeded with.

Per BURTON, and MOSS, JJ.—The absence of an adequate legal remedy was a sufficient ground for granting a writ of mandamus, notwithstanding the existence of an equitable remedy; and since the Administration of Justice Act, 1873, the applicant for such a writ should succeed on disclosing a case which would entitle him to relief in equity. Per MOSS, J.—This writ is not now invested with any prerogative character in this Province; and it would be a convenient rule, upon applications for it, to act upon principles similar to those which govern a Court of Equity in suits for specific performance.

Per BURTON and MOSS, JJ., the financial status of the company could not properly be considered as forming a ground of decision.

Per BURTON and MOSS, JJ., admitting the construction of C. S. C. ch. 66, sec. 10, to be that the execution of the railway could not be proceeded with before filing the plans, and not, as contended, that the section relates only to the compulsory power of the company as to taking lands, &c., the omission could not, under the facts of this case, be held a sufficient answer to the application. *The Stratford and Huron R. W. Co. and the Corporation of the County of Perth*, 112.

2. *Obligation to fence against horses—C. S. C. ch. 66, sec. 13.*]—The plaintiff's horse having a right to pasture in a pasture field belonging to one M., escaped into a pea field adjoining, also owned by M, owing to a defect in the fence dividing the two fields, and from the pea field he got on to the defendants' track adjoining it, by reason of the insufficiency of the defendants' fence, and was killed.

Held, that defendants were liable, for the horse was not wrongfully in the pea field as regarded M., having got there owing to M.'s defective fence; and it therefore was not wrongfully there as regarded the defendants, who were bound to fence as against M.

The word "cattle" in C. S. C. ch. 66, sec. 13, applies to horses. *McAlpine* v. *Grand Trunk R. W. Co.*, 446.

3. *G. W. R.—Award for land—Defective title—Right to recover on award.*]—The plaintiffs were executors and trustees under the will of L., by which he devised the lot, of which the land in question formed part, to his wife during her life or widowhood; in case of her second marriage, he directed his executors to sell it and invest the price, and to pay to his wife one-third of the interest during her life; and in the event of her death, as soon as it could be done with due regard to the interest of the property, he directed them to sell the lot and divide the proceeds among his children and grandchildren, as specified. Some of them were infants, and the widow was in occupation of the farm, unmarried.

Under these circumstances the plaintiffs, under the statutes relating to the defendants, entered into an arbitration with defendants, who required part of the lot for a gravel pit, and were unable to agree upon the price; and the arbitrators, on the 29th November, 1872, awarded that defendants should pay to the respective persons entitled to receive the same $9,000 for said land, which they assessed and declared to be the full value of the fee simple. The widow was no party to the arbitration. On the 3rd December defendants notified the plaintiffs that they would not take the land, of which they had never taken possession, and that they withdrew from the purchase. The widow, who continued in occupation, did not convey to the plaintiffs her interest until 7th January, 1874, and having tendered a conveyance to the defendants in February, 1874, they brought this action on the award on the 23rd of March following.

Held, that the plaintiffs could not recover on the award. Per MORRISON, J.—The plaintiffs were neither owners nor occupiers, and at the time of the award had no beneficial interest in the land; the deed by the widow of her interest, made afterwards, would not give them the power to sell, neither of the events on which such power was to be exercised having happened, or, at all events, the plaintiffs' title under it was too doubtful to force upon a purchaser; the delay in tendering a conveyance, if the after-acquired title had enabled the plaintiffs to make a good title, was such as to prevent the plaintiffs from enforcing the award; and the award was bad for uncertainty, in not stating the respective persons to whom the money should be paid and the respective sums. *Mitchell et al.* v. *The Great Western R. W. Co.*, 471.

REGISTRATION.

Registry law—Omission to index deed—29 Vic. ch. 24.]—The plaintiff claimed lot 25 under a deed from the heirs at law of S., the patentee, executed in 1875. Defendants claimed under a deed from S. dated and registered in 1867, but the registrar had omitted to enter defendants' deed in the abstract index, and in

consequence, when the plaintiff enquired at the registry office before taking his deed, he was told that the patentee had made no conveyance. *Held*, under 29 Vic. ch. 24, D., that the registrar's omission did dot invalidate the registration, or deprive defendants' deed of its priority.—*Lawrie* v. *Rathbun et al.*, 255.

REGULÆ GENERALES.

Issue books.]—524.

Paper books.]—524.

Nisi Prius record.]—524.

Criminal cases reserved.]—525.

Short-hand reporters.]—526.

REVERSION.

Action by mortgagee for injury done to.]—*See* MORTGAGEE.

RIPARIAN RIGHTS.

See ESTOPPEL.

RULES AND ORDERS.

Rule nisi for new trial—Statement of grounds.]—It is insufficient, in a rule *nisi*, to ask for a new trial for misdirection and non-direction, and on the ground of improper rejection of evidence and improper admission of evidence. The objections must be more specifically stated. *McDermott et al.* v. *Ireson*, 1.

SALE OF GOODS.

1. *Excessive demand—Right to recover back excess — Money had and received—Money paid.*] — The defendant, assignee in insolvency of L. & Co., advertised the whole estate for sale, consisting of a wholesale stock of groceries, &c., and a distillery and plant, which were specified in the advertisement in parcels, with the supposed value of each, the total being said to be about $51,000. He had an inventory prepared, which professed to give the cost price, and the advertisement invited tenders "at so much in the dollar on inventory price," to be paid in three equal quarterly instalments, or five per cent. to be allowed off for cash. Most of the goods were then in bond. W. & Co., on the 12th of January, 1875, tendered for the whole stock, "as per inventory, the sum af 76¼ cents on the dollar, payable in cash after having checked over the stock and found it correct." On the next day, at a meeting of creditors, the assignee was instructed to accept this offer, and he wrote to W. & Co., accepting it, repeating the offer almost in their words. Afterwards, acting under the orders of certain creditors, the assignee refused to deliver the goods to W. & Co., unless they would pay the duty as well as the 76¼ cents on the $51,000; and to obtain the goods, W. & Co. had to pay $43,000, bein' about $1,500 more than they would owe according to their offer, without the duty.

Held, that looking at the advertisement, tender, and acceptance, W. & Co. were not bound to pay the duty; and that the payment by them was not a voluntary one, so as to prevent them from recovering back the excess as money had and received.

W. & Co., to obtain possession of part of the distillery plant which was affixed to the distillery, had to expend money in order to remove it:

Held, recoverable as money paid. *Wilson et al.* v. *Mason—Lamb* v. *Wilson et al.*, 14.

2. *Implied warranty.*] — Where an article is supplied for a particular purpose — such as, in this case, a furnace to heat the plaintiff's offices—and the vendor is to put it up for that object, there is an implied warranty that it will answer, and will be put up so as to answer, the purpose intended.

In this case it was *held* that there was nothing in the defendant's written tender, set out in the report, to exclude the implied warranty, and that the evidence supported a verdict for the plaintiffs. *Bigelow et al.* v. *Boxall*, 452.

3. *Order misunderstood — Delivery of the wrong article.*] — The plaintiffs who were potters at Peterborough, sent an order to defendants at Toronto, for $9 worth "of stone spar such as potters use." Defendants answered acknowledging the receipt of the money, "which we have placed to your credit for stone." The order was entered in the order book as for stone, but defendants' manager crossed it out, and wrote ground flint, thinking that must be what was meant, though he said he might as well have sent Cornish stone. The evidence shewed that spar or feld spar was a substance used in the United States for the same purposes for which stone or Cornwall stone is used in England. The flint was sent in a barrel, which the defendants said was marked flint, and the railway receipt to them was for "one barrel flint." The station master at Peterborough entered it from the way bill as *one barrel fluid*. The plaintiffs alleged that the barrel was not marked "flint;" that the railway notice described it as fluid: that they received and used it assuming it to be stone as ordered, there being nothing in the appearance to distinguish it, and they having before got stone from the defendants. Being thus used instead of stone it destroyed the plaintiffs' ware, and for this the plaintiffs sued.

The jury were directed that defendants were liable if the order sent by the plaintiffs should have been understood by defendants as an order for Cornwall stone, and if the plaintiffs were justified in believing that the article sent was, and did not know that it was not, such stone; but that if defendants were justified in sending ground flint on the order received, they would not be liable—and they found for the plaintiffs $150.

Held, reversing the judgment of the County Court, on which a nonsuit had been afterwards ordered, that the direction was right, and that it was not a case in which the parties' minds were not *ad idem*, so that no agreement had been made. *Baker et al.* v. *Lyman*, 498.

SALE OF LAND.

1. *Agreement — Construction — Liability for interest.*]—Defendants being in possession of land as tenants under the plaintiffs for a year at $100, they, on the 26th of October, 1865, entered into an agreement under seal, by which it was witnessed that the plaintiffs sold to defendants the premises which it was said they had leased from the plaintiff "with this understanding of purchase." The plaintiffs were to give the defendants credit "on purchase money for all rents or moneys paid or that shall be paid until the time of the first par-

ties (plaintiffs) making the title, and said party to make the title by the 1st of January, 1868, or as soon as he can get the ackowledgment of his father to a deed that is now made, and in possession of said first party; and the said first party to pay ten per cent. on all moneys paid by the second party over $100 a year, until the said title be made. The second party (defendants) agrees to pay for the above property $2,000, in three equal annual payments, after the deduction of such money as has been paid at the making of the title." Defendants continued in possession until 1870, paying various sums.

Held, that up to the 1st January, 1868, when the title should have been completed, the seller was not to receive interest nor the benefit of the rents, if the purchase went on, but that after that date the purchaser remaining in possession was bound to pay interest.—*Vanzant et al.* v. *Burke et al.*, 104.

2. *Bond to remove cloud on title—Excuse for non-performance—Time, when of the essence of the contract—Damages.*]—Plaintiff declared against the executor of C., on a joint and several bond executed by C. and W., reciting that the plaintiff had agreed to purchase from W. certain land in fee simple free from all incumbrances, and that C. had conveyed the land to one K., deceased, having made a previous conveyance to W., by which conveyance to K. a cloud upon the title was created; and the condition was, that C. should within two months procure from K.'s repretentatives a conveyance of all their interest in the land to the plaintiff, or in case of their being unable to execute such conveyance by reason of any disability, should within said two months take such proceedings as would remove said cloud, and within that time remove the same, and make and complete a good, absolute, and clear paper title to said land free from all incumbrances. Breach, that neither C. nor W. did within said two months or at any time, procure such conveyance from the representatives of K., nor had such proceedings been taken, nor said cloud removed, nor a good title, &c., made.

Plea, on equitable grounds, in substance, that the deed from C. to K. was made by mistake, and K. in the same way mortgaged back to C.: that C. before this deed and mortgage had conveyed to W. in fee, and W. to the plaintiff, who was aware of the title and bought from W. on the understanding that proceedings should be taken to foreclose said mortgage, on which default had been made, in order that C. might execute a quit claim to the plaintiff: that C. accordingly proceeded to foreclose the mortgage, but before foreclosure C. died, whereby the proceedings were suspended until revival of the suit in the name of defendant as executor; but they were afterwards conducted to a final decree without delay. And defendant alleged his readiness and willingness to release all K.'s interest in the land to the plaintiff and that in fact there was and is no cloud on the title, the deed to W. having been executed and registered before the conveyance to K.

Held, reversing the judgment of GALT, J., that the plea was bad, for although the conveyance to K. was, under the facts alleged, no cloud upon the title, defendant could not set this up as an excuse for non-performance of his express contract to remove it, and make a clear title to the plaintiff within a specified time.

Semble, per HARRISON, C. J., that in such a case time would be of the essence of the contract in equity as well as at law. *Matthews* v. *Cragg*, 519.

See *Matthews* v. *Walker*, 26 C. P. 67.

SEDUCTION.

See PENALTY.

SERVANT.

Wrongful dismissal of.] — *See* MASTER AND SERVANT.

Sale of liquor to.]—*See* TAVERN AND SHOP LICENSES, 2.

SETTLEMENT OF SUIT.

See PENALTY.

SHIPPING.

Vessels — Collision — Accident— New trial—Direction to the jury.]— In an action for collision between two sailing vessels owned by the plaintiffs and defendant respectively, it appeared that both vessels were running to windward close-hauled, the plaintiffs' vessel on the starboard, and the defendant's vessel on the port tack. Defendant's vessel, it was admitted, did what was best as soon as the plaintiffs' lights were seen, but the complaint was, that he should have seen them sooner. This he explained by alleging that there was a haze on the water, which the plaintiffs' witnesses denied. The jury were directed that if defendant used every means in his power to avoid a collision after he saw the plaintiffs' lights he would not be liable, nor if they believed it was simply an accident without negligence on the defendant's part.

Held, under the circumstances, not a misdirection; but the jury having found for defendant a new trial was granted, on affidavits shewing the discovery of new evidence to prove that there was no haze at the time. —*Downey et al* v. *Patterson*, 513.

See INSURANCE.

SHOPS.

See TAVERN AND SHOP LICENSES.

SHORT FORMS OF LEASES.

Act respecting.]—*See* LEASE.

STATUTES.

The divisions of a statute, under which the clauses are arranged and classified, may be looked to as affording a key to the construction. *Lawrie* v. *Rathbun et al.*, 255.

STATUTES (CONSTRUCTION OF.)

C. S. C., ch. 66, sec. 10—*See* RAILWAY AND RAILWAY COS. 1

C. S. C., ch. 66, sec. 13—*See* RAILWAYS AND RAILWAY COS. 2.

C. S. U. C., ch. 92—*See* LEASE.

C. S. U. C, ch. 112—*See* CRIMINAL LAW, 1.

C. S. L. C., ch. 91—*See* EXECUTORS AND ADMINISTRATORS.

29 Vic., ch. 24—*See* REGISTRATION.

29-30 Vic., ch. 51, sec. 296, sub-sec. 32, sec. 223 *et seq.*—*See* CHIMNEY SWEEPS—MUNICIPAL CORPORATIONS, 2.

32-33 Vic., ch. 22, sec. 29 D—*See* CONVICTION 3.

32-33 Vic., ch. 31, sec. 66 D.—*See* CONVICTION 3.

33 Vic., ch. 7, sec. 6 O.—*See* APPEAL.

35 Vic., ch. 12 O.—*See* INSURANCE 2.

36 Vic., ch. 8, sec. 2, O.—*See* BANKRUPTCY AND INSOLVENCY—INSURANCE 4.

36 Vic., ch. 44, sec. 39, O.—*See* INSURANCE 2.

36 Vic., ch. 48, secs. 372, 378, O.—*See* MUNICIPAL CORPORATIONS 3—TAVERN AND SHOP LICENSES 1, 2, 3.

37 Vic., ch. 32 O.—*See* CONVICTION 2—TAVERN AND SHOP LICENSES 1, 4.

38 Vic., ch. 11 O —*See* CONVICTION 2.

39 Vic. ch. 26, sec. 2, sub-sec. 3 O.—*See* TAVERN AND SHOP LICENSES 1, 2.

STREET R. W. CO.

Negligence of.]—*See* CARRIERS.

SURFACE WATER.

Right of drainage.]—*See* WATERS AND WATER COURSES.

TAVERN AND SHOP LICENSES.

1. *Sale of liquors—39 Vic. ch. 26, O.*]—A by-law of a town, passed under the 39 Vic. ch. 26, sec. 2, sub-sec. 3, O., limiting the number of shop licenses to be issued in the town to one, and directing the holder of such license to confine the business of his shop exclusively to the keeping and selling of liquor: *Held*, bad, as being in effect prohibitory and creating a monopoly.

A provision that the duties to be paid for a tavern license in the town should be $100, and for a shop license $200: *Held*, to mean that the sums mentioned should include the government duty, and therefore to be within the power of the council, under sec. 16, sub-sec. 2.

It was also provided, 1. That in all places in the town licensed to sell intoxicating liquors, no sale or other disposal thereof should take place therein after 7 on Saturday night until 6 on Monday morning, nor on any other day between 10 P.M. and 6 A.M.; and that during these hours the bars of all taverns should be kept closed.

2. That the holder of a tavern or shop license should not be permitted to sell intoxicating liquor at any other than the house for which he had received a license, except that in case of his removal to another house the inspector might endorse his permission on the license.

Held, beyond the jurisdiction of the council, as being an exercise of the powers transferred by the Act, sec. 1, to the Board of License Commissioners.

A provision that no sale, &c., of any intoxicating liquor in any licensed tavern or shop to any child, servant, or apprentice, without the consent of a parent, master, or legal guardian: *Held*, valid, for being authorized by the Municipal Act, 36 Vic. ch. 48, sec. 379, sub-sec. 31, independently of the 37 Vic. ch. 32, O., the power was not transferred to the commissioners.

A clause, that no gambling, profane swearing, blasphemous or grossly insulting language, or any indecency or disorderly conduct, should be permitted in any licensed tavern or shop: *Held*, also valid, as being authorized by the Municipal Act, sec. 379, sub-secs, 33, 36, and by the general police power of the council.

It was held no objection that the by-law contained no limit to its duration, as that was determined by the statute 39 Vic. ch. 26, sec. 2, sub-sec. 3, secs. 6, 12. *Re Brodie and the Corporation of the Town of Bowmanville*, 580.

2. *Billiard tables*—39 *Vic. ch.* 26 ; 36 *Vic. ch.* 48, *sec.* 379, *sub-secs.* 3, 31, 35, 36, *O.*]—A clause in a town by-law for the regulation of taverns and shops licensed to sell spirituous liquors, prescribing the hours during which liquors should not be sold, or the bar-rooms kept open : *Held*, unauthorized, following *Brodie and The Corporation of Bowmanville*, ante p. 580.

A prohibition in the by-law against the giving of liquor to any minor or apprentice without a *written* order from his guardian or master : *Held*, good, for the statute authorizes the requirement of a consent, and the condition as to its being written was not open to objection.

A provision that no billiard table or bowling alley should be licensed or kept in any such tavern, inn, or house of entertainment. *Held*, authorized by the power given to the corporations to regulate billiard tables and bowling alleys : 36 Vic. ch. 48, sec. 379, sub-secs. 3, 35, 36, O.

A provision that in all shops where liquor is sold no sale shall take place between 7 p.m. and 7 a m. *Held*, valid, under 39 Vic. ch. 26, sec. 12, O. *Re Arkell and the Corporation of the Town of St. Thomas*, 594.

3. *Tavern licenses.*]—A Township Corporation cannot make the sum payable for tavern licenses vary according to the locality ; as, in certain villages named $100, and elsewhere in the municipality $75. Such a distinction is contrary to the spirit, at least, of sec. 24 of the Municipal Act, 36 Vic. ch. 48, O.—*Re Donelly and the Corporation of the Township of Clarke*, 599.

4. *Duty*—37 *Vic. ch.* 32, *O.*]—A by-law passed in February, 1875, under the 37 Vic. ch. 32, enacting that the fees to be paid to the municipality for every certificate for a shop or tavern license under the by-law should be $130 : *Held*, valid, without approval of the electors, for under that Act the municipalities could exact up to $130 *for their own use*, without submission to the people.

The by-law was not moved against until March 14, 1876, and the licenses granted under it would expire on the 30th April, 1876 : *Held*, that on the ground of delay the Court would have refused to quash.—*Re Richardson and the Board of Commissioners of Police for the City of Toronto*, 621.

TEMPERANCE ACT OF 1864.

1. *Omission to publish the requisition.*]—Where a by-law under the Temperance Act of 1864 had been adopted by the electors under a requisition, but the by-law only had been published and not the requisition for adoption of it, as the statute requires, and it was sworn and not denied that this omission prevented many from voting, the by-law was quashed.—*Re Day and the Corporation of the Township of Storrington*, 528.

2. *Publication of requisition.*]—The requisition for adoption of a by-law under the Temperance Act of 1864, was first published on the 21st January, 1876, the next publication was on the 3rd February, and the last on the 10th February—so that there was no publication for the week beginning 28th January, though the statute requires it to be published "for four consecutive weeks."

The Court refused to quash the by-law on this objection, it having been carried by a majority of 240,

and there being no allegation that the irregularity prejudiced the voting.—*Re Wycott and the Corporation of the Township of Ernestown*, 533.

TIMBER.

Right of mortgagee to bring trespass for, cut on mortgaged premises]—*See* MORTGAGE.

Agreement to get out.]—*See* CONTRACT, 2.

Mixture of.]—*See* CONFUSION OF PROPERTY.

TIME.

When of the essence of the contract.]—*See* SALE OF LAND, 2.

TITLE.

Supplementing defective title during arbitration.]—*See* RAILWAYS AND RAILWAY COS., 3.

See SALE OF LAND, 2.

TRESPASS.

Action for arrest of plaintiff and dismissal from defendant's service—Justification under suspicion of felony—Pleading]—Declaration in trespass, for assaulting the plaintiff and giving him into custody. Plea, that the plaintiff was defendant's clerk, and as such was in the habit of receiving money for the defendant: that a large sum of defendant's money which had come into plaintiff's hands was feloniously stolen by some person; that the plaintiff, though requested by defendant, would not account for the same; whereupon the defendant, having good and probable cause of suspicion and suspecting the plaintiff to have been guilty of the felony, gave him in charge to a constable to take him before a magistrate. *Held*, no defence, for that no reasonable or probable cause was shewn either as regarded the action of defendant or of the constable. *Patterson* v. *Scott*, 642.

By mortgagee—For cutting timber.]—*See* MORTGAGE.

See CONFUSION OF PROPERTY.

TROVER.

By mortgagee for timber cut.]—*See* MORTGAGE.

See CONFUSION OF PROPERTY.

TRUSTS AND TRUSTEES.

Assignment in trust for creditors.]—*See* BANKRUPTCY AND INSOLVENCY.

VERDICT.

See CONTRACT, 2.

WARRANTY.

See SALE OF GOODS, 2.

WATERS AND WATER-COURSES.

Surface water—Rights of drainage—Liability of municipal corporation.]—There had for many years been a culvert across a highway adjoining the plaintiff's land through which the surface water from his land had been accustomed to pass, but the path-master closed it up and made the roadbed solid, by which the flow of surface water from the plaintiff's land was impeded, and the

land remained longer wet than it would otherwise have been. The corporation by resolution approved of the pathmaster's action.

Held, that the plaintiff had no cause of action, for there was no right of drainage across the highway for the surface water, and the corporation could not be liable for not exercising their discretionary powers with regard to drainage of lands. *Darby* v. *The Corporation of the Township of Crowland*, 338.

See ESTOPPEL.

WAYS.

1. *Bridge—Obligation to repair.*]—Defendants having been indicted for not repairing a bridge, it appeared at the trial that the bridge was not on the actual line of the road allowance, put upon land procured from a neighbour for that purpose, but it had been built by defendants as part of the road, and used for ten or twelve years until its injury by a flood in April, 1874. Defendants were indicted in June following, and contended that a bridge might be dispensed with at that place: that they had not had a reasonable time before the indictment to determine what they should do; and that it was in their discretion whether to build it or not. The jury found that the bridge was a convenience to the public or a portion of the public: that defendants had had a reasonable time to exercise their discretion; and the private prosecutor, who had applied to them to repair it, had reason to conclude that they would not act, and they found defendants' guilty.

Held, that these were proper questions for the jury, and the verdict was upheld; but was directed that no proceedings should be taken on it until defendants should shew cause why judgment should not be given against them. *Regina* v. *The Corporation of the Township of McGillivray*, 91.

2. *River separating townships—Bridge over—Obligation to repair.*]—A bridge had been built in 1857, by a joint stock company formed under the 16 Vic. ch. 190, at the village of York, about half way between Caledonia and Cayuga, over the Grand River which separates the two townships of Seneca and Oneida, in the county of Haldimand. In 1862 it was destroyed by a storm, rebuilt in 1863, and kept in repair since by tolls collected upon it. In 1873 it became out of repair and dangerous, and the secretary of the company wrote to the county council that the company abandoned the bridge. The county having been indicted for not repairing it:

Held, that they were not liable; for 1. By the statute then in force, 35 Vic. ch. 33, sec. 9, the abandonment by the company could only be by by-law; and 2. There having been no bridge there before, there was nothing for the county council to resume, and they had refused to assume this bridge, which had never become a public highway by dedication, tolls having been imposed upon it.

Semble, that a bridge like this, the only work owned by the company, may be abandoned as well as a road.

Quære, whether the county could not be obliged to establish a bridge across the river at some convenient place between Caledonia and Cayuga, there being none for that distance, about eleven miles. *Regina* v. *The Corporation of the County of Haldimand*, 396.

3. *Obligation on county to repair bridge—Mandamus—Indictment.*]—Where a county council is liable to repair a bridge the proper remedy is indictment, not mandamus. *Re Jamieson and the Corporation of the County of Lanark*, 647.

Obstruction of.]—*See* CRIMINAL LAW, 2.

See WATERS AND WATER COURSES.

WHARF.

See CRIMINAL LAW, 2.—MUNICIPAL CORPORATIONS, 3.

WILL.

Construction of.]—*See* RAILWAYS AND RAILWAY COS., 3.

WORDS.

"*Cattle*," *under C. S. C. ch.* 66, *includes horses.*]—*See* RAILWAYS AND RAILWAY COS., 3.

"*Secure.*"]—*See* CONTRACT, 1.

WORK AND LABOUR.

1. *Building agreement — Liquidated damages for delay—Pleading.*]—Plaintiff, by deed, agreed to build a house for defendant for $1,150, by a day named, and that for each day that should elapse after that day until completion, defendant might deduct $5 from the contract price.

Held, that the sum of $5 per day was liquidated damages not a penalty, and that it might be deducted from the contract price, without pleading it specially by way of set-off. *Scott* v. *Dent*, 30.

2. *Building contract — Architect's certificate—Effect of taking possession.*]—The plaintiffs agreed in writing to build a house for defendant, for $10,405, $2,000 in advance, and the balance at the rate of 85 per cent. for the work fixed in its place, but no payment to be made without a written certificate from the architect; the remaining 15 per cent. to remain in defendant's hands for a month after the completion of the work, and also until all the defects which the architect should within that period certify to exist shouldbe remedied. It was also agreed that no extras should be permitted or allowed unless agreed upon in writing, and that the writing should be produced before payment therefor. In an action to recover the 15 per cent., and for extras:

Held, that this could not entitle the plaintiffs to recover under the common counts. *Munro* v. *Butt*, 8 E. & B. 738, approved of and followed.

Held, that the certificate as to defects need not be in writing, that not being expressly required; and, there being evidence that the architect within the month verbally signified his dissatisfaction with certain specified defects, that the plaintiff could not recover.

Held, also, that there could be no recovery for extras claimed, no writing therefor having been produced. *Oldershaw et al.* v. *Garner*, 37.